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THE LAW

OF

QUASI CONTRACTS

BY

FREDERIC CAMPBELL WOODWARD

PROFESSOR OF LAW IN
LELAND STANFORD JUNIOR UNIVERSITY

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To

JOHN HENRY WIGMORE

AND THE MEMORY OF

ERNEST W. HUFFCUT

THIS BOOK IS GRATEFULLY

DEDICATED

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PREFACE

Professor Keener's treatise on Quasi Contracts appeared in 1893. It has done much to clarify the views of lawyers and teachers, and undoubtedly has had a salutary influence in the development of the law. For some time, however, there has been urgent need of a book containing a further analysis and classification of quasi contractual obligations, a more thorough treatment of many parts of the subject, and a larger collection of modern authorities. It was with the hope of meeting this need that the present work was undertaken.

I wish to acknowledge my indebtedness to previous writers. The treatise of Professor Keener and the case books of Professor Scott and Professor Woodruff have been invaluable, and various contributions to the literature of the subject by Professor Ames and Professor Williston of Harvard, Professor Wigmore and Professor Costigan of Northwestern, and Professor Corbin of Yale, have been of the greatest assistance. I desire also to record my appreciation of helpful criticism and advice received from Professor Wigmore and my colleague Professor Cathcart, and of intelligent assistance from Walter Slack, Esq., of the San Francisco Bar.

The greater part of Chapter III has already appeared in the form of an article in the *Columbia Law Review*, and is reproduced here, with some modification, by the courtesy of the publishers of the *Review*.

F. C. W.

STANFORD UNIVERSITY, CALIFORNIA,
October 26, 1912.

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THE LAW OF QUASI CONTRACTS

CHAPTER I

INTRODUCTION: ORIGIN AND NATURE OF QUASI CONTRACTS

§ 1. (I) Scope of the subject.
§ 2. (II) Origin of quasi contracts.
§ 3. (III) Nature of quasi contracts:
(1) Chief characteristics.
§ 4. (2) Quasi contracts distinguished from contracts.
§ 5. (3) Quasi contracts distinguished from the duty not to commit a tort.
§ 6. (4) Quasi contracts distinguished from equitable obligations.
§ 7. (IV) Essential elements of quasi contractual obligation.
§ 8. (1) Receipt of a benefit.
§ 9. (2) Retention of benefit inequitable: Classification of quasi contracts.

§ 1. (I) **Scope of the subject.** — Since the field of quasi contracts is not one of settled and precise limits, it is necessary, at the outset, to indicate just what part of the law of obligation this treatise is intended to cover. The term "quasi contracts" may with propriety be applied to all noncontractual obligations which are treated, for the purpose of affording a remedy, as if they were contracts. So interpreted, the subject includes: (1) judgments and other so-called contracts of record; (2) a number of official and statutory obligations, such as the official obligation of a sheriff to levy execution and pay over the proceeds, and the statutory obligation of the owner of a vessel to pay pilotage;[1] and (3) obligations arising from "unjust

[1] See Speake *v.* Richards, Hob. 206; Steamship Co. *v.* Joliffe, 1864, 2 Wall. (U. S.) 450. Professor Ames, whose example was followed by Professor Keener, included in this second class a number of customary obligations, such as that of the innkeeper and that of the carrier, which are not enforced, ordinarily, by means of contractual forms of action,

enrichment," *i.e.* the receipt by one person from another of a benefit the retention of which is unjust. But in view of the fact that nearly all of the obligations included in the first two classes are commonly known and treated under more specific designations, or as parts of other clearly defined topics, while those of the third class have no other distinctive name whatever, it is believed that the term "quasi contracts," for the sake of convenience, should ordinarily be applied to obligations of the third class alone. For this reason, and for the further reason that they constitute a homogeneous group, essentially different from all others, this book will treat solely of obligations arising upon the receipt of a benefit the retention of which is unjust.

§ 2. (II) **Origin of quasi contracts.** — Although there are earlier cases in which obligations which would now be recognized as quasi contractual were enforced, Lord MANSFIELD'S opinion in the case of *Moses* v. *Macfarlan*,[1] decided by the Court of King's Bench in 1760, may be said to mark the emergence of quasi contract as a distinct species of common law obligation. Some knowledge of the actions of debt and assumpsit is essential to an understanding of that opinion. Debt was a form of action that lay to recover a definite sum due by a record or a contract under seal or as the price of some thing or service; assumpsit, an action of later origin, lay to recover damages for the breach of such simple contracts as were not reached by the action of debt. In order to avoid the possibility of defense by wager of law,[2] which was allowed in debt, attempts were made to use

but which superficially resemble most contracts and differ from the duty not to commit a tort, in that they require the obligor to act rather than to forbear. See Ames, "History of Assumpsit," 2 Harv. Law Rev. 53, 64; Select Essays in Anglo-American Legal History, Vol. III, 259, 292; Keener, "Quasi-Contracts," p. 18. For a discussion of the distinction between quasi contracts and the duty not to commit a tort, see, *post*, § 5.

[1] 2 Burr. 1005.

[2] Wager of law was a method of trial. The oath of the defendant that he did not owe the debt, fortified by the oaths of a number (usually eleven) of his kinsmen and neighbors, called oath helpers or compurgators, that his oath was true, constituted a defense to the action. See Pollock and Maitland, "History of English Law," Vol. II, 600. 634. There is a reported instance of its use as late as 1824 (King *v.* Williams,

the action of assumpsit in cases of simple contract to which debt applied. Eventually, by a process consisting of two distinct stages, this extension of assumpsit was accomplished. First, it was held that a preëxisting debt constituted a consideration for a promise, and therefore, if one who was already under an obligation enforceable by an action of debt made a promise to pay the debt, such promise was enforceable by an action of assumpsit.[1] Then, it was declared that a promise to pay a debt would be implied and it was therefore unnecessary to prove an express promise.[2] Indebitatus assumpsit, as it was called, thus became a concurrent remedy in cases of debt upon a simple contract. This was the situation when *Moses* v. *Macferlan*[3] arose. In that case, Moses had indorsed notes of one Jacob to Macferlan upon the latter's agreement that no suit should be brought against Moses on the notes. In violation of his agreement Macferlan had sued Moses upon his indorsements in the Court of Conscience[4] and had obtained a judgment, the court taking the view that it had no jurisdiction over the collateral agreement not to sue which Moses had set up as a defense. Moses paid the judgment and then brought indebitatus assumpsit in the King's Bench to recover the money so paid. For the defendant, it was objected that since the case was neither one of a genuine promise by the defendant nor one to which the action of debt applied, the action of assumpsit would not lie. But Lord MANSFIELD, desirous of extending still further the scope of that simple and advantageous remedy, and finding his justification in the principles of the Roman law,[5] declared that the objection was without merit, saying:[6]

2 Barn. & Cr. 538) and it was not formally abolished until 1833. See 73 Statutes at Large (3 & 4 Will. IV) c. 42, § 13. In America the practice never obtained a foothold. See Childress *v.* Emory, 1823, 8 Wheat. (U. S.) 642, 675.

[1] See Manwood *v.* Bruston, 1588, 2 Leo. 203, 204.

[2] Slade's Case, 1602, 4 Coke, 92 b.

[3] 1760, 2 Burr. 1005.

[4] An inferior court for the collection of small debts.

[5] See Appendix by Sir W. D. Evans to Pothier, "Obligations" (1806), Vol. II, 321–324; Scott, "Cases on Quasi-Contracts," pp. 9–16.

[6] At page 1008.

"If the defendant be under an obligation, from the ties of natural justice, to refund, the law implies a debt, and gives this action, founded in the equity of the plaintiff's case, as it were upon a contract ('*quasi ex contractu*,' as the Roman law expresses it). . . . This kind of equitable action, to recover back money, which ought not in justice to be kept, is very beneficial, and therefore much encouraged. It lies only for money which, *ex æquo et bono*, the defendant ought to refund: it does not lie for money paid by the plaintiff, which is claimed of him as payable in point of honor and honesty, although it could not have been recovered from him by any course of law, — as in payment of a debt barred by the statute of limitations, or contracted during his infancy, or to the extent of principal and legal interest upon a usurious contract, or, for money fairly lost at play; because in all these cases the defendant may retain it with a safe conscience, though by positive law he was barred from recovering. But it lies for money paid by mistake; or upon a consideration which happens to fail; or for money got through imposition, (express or implied); or extortion; or oppression; or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances. In one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money."

Thus, by the device of a fictional promise, the door was opened to the enforcement of those obligations, previously unrecognized by the common law, which are now known as quasi contracts.

§ 3. (III) **Nature of quasi contracts**: (1) **Chief characteristics.** — The general nature of quasi contractual obligations is revealed by the foregoing sketch of their origin. They may be defined as legal obligations arising, without reference to the assent of the obligor, from the receipt of a benefit the retention of which is unjust, and requiring the obligor to make restitution.[1] Their chief distinguishing characteristics are as follows:

[1] For an excellent discussion of the nature of quasi contracts, see Professor Corbin's article on "Quasi-Contractual Obligations," 21

1. They are paramount or irrecusable, as distinguished from consensual or recusable, obligations.[1] That is, they are imposed by law without reference to the assent of the obligor.

2. They are particular, as distinguished from universal, obligations. That is, they are imposed because of a special state of facts and in favor of a particular person, and do not rest upon one at all times and in favor of all persons.

3. They are based upon equitable considerations, but had their origin in the courts of law and are enforced by so-called legal remedies.

4. They require that the obligee shall be compensated, not for any loss or damage suffered by him, but for the benefit which he has conferred upon the obligor.

The first, second, and third characteristics serve, as will be seen in the following sections, to distinguish quasi contracts from contractual obligations, from the general obligation not to commit a tort, and from equitable obligations proper, respectively. The fourth characteristic governs the measure of recovery. This will be treated specifically in connection with various classes of quasi contracts hereafter to be considered. In this chapter it is only necessary to say that while in many cases of the receipt of property there is doubtless a moral obligation to make restitution *in specie*, and while equity frequently compels restitution *in specie*, the only obligation recognized and enforced at law is the obligation to make restitution in value, *i.e.* to pay the equivalent or the reasonable worth of the benefit received.[2] This obligation, for the sake

Yale Law Jour. 533. Treating judgments and certain statutory, official, and customary obligations as within the field, he defines a quasi contract to be "a legal obligation, not based upon agreement, enforced either specifically or by compelling the obligor to restore the value of that by which he was unjustly enriched."

[1] For the classification of obligations as recusable and irrecusable and the division of irrecusable obligations into particular and universal, see Professor Wigmore's article, "The Tripartite Division of Torts," 8 Harv. Law Rev. 200, 201.

[2] As to the primary obligation of one in default under a contract within the Statue of Frauds, see *post*, § 96.

of convenient brevity and in order to distinguish it from the secondary obligation of the contractor or tort-feasor to compensate the injured party for the damages suffered by him, will hereafter be called the obligation to make restitution.

§ 4. (2) **Quasi contracts distinguished from contracts.** — Only within the last generation have quasi contractual obligations been commonly so called. They were formerly regarded as a species of contract, and to distinguish them from express contracts and contracts implied in fact, *i.e.* contracts in which a promise is inferred from conduct, were called contracts implied in law. Since, like contracts proper, they were enforced by means of the action of assumpsit, it is not surprising that in a period when more importance was attached to the forms of legal remedies than to the nature of substantive rights, the essential dissimilarity of the two obligations was not observed. The persistent failure to recognize it, however, has resulted in confusion and error, and in many cases has wrought serious injustice. It cannot be too strongly emphasized, therefore, that quasi contracts are in no sense genuine contracts. The contractor's obligation is one that he has voluntarily assumed. He is bound because he has made a promise or undertaking that the law will enforce. And the only difference between an express contract and a contract implied in fact is that in the former the promise or undertaking is verbal, while in the latter it is an implication of the promisor's conduct. But quasi contractual obligations are imposed without reference to the obligor's assent. He is bound, not because he has promised to make restitution — it may be that he has explicitly refused to promise, — but because he has received a benefit the retention of which would be inequitable.

In view of this generic difference between contractual and quasi contractual obligations the use of the term " contracts implied in law " to describe the latter is particularly misleading. This was recognized by Sir Frederick Pollock and Sir William Anson, who adopted from the Roman law and from works on the science of jurisprudence the term " quasi contracts," denoting obligations bearing " a strong superficial analogy or

resemblance "[1] to contracts, but essentially different therefrom. Other writers have suggested the term "constructive contracts," *i.e.* fictional contracts imagined or constructed by the courts for the purpose of affording a remedy.[2] Neither of these designations is as happy as would be one that avoided altogether the use of the word " contracts," but they are less objectionable than the term " contracts implied in law." The former of them — " quasi contracts " — has recently come into general use.[3]

§ 5. (3) **Quasi contracts distinguished from the duty not to commit a tort.** — Quasi contractual obligations and the obligation or duty a breach of which constitutes a tort[4] are alike paramount, or irrecusable. That is, unlike contractual obligations, they are imposed without reference to the obligor's assent. As accounting for the fact that notwithstanding this similarity the courts adapted to this class of obligations contractual rather than tort remedies, it has been pointed out that

[1] Maine, "Ancient Law" (3d Am. ed.), p. 332.

[2] See opinion of Lowrie, J., in Hertzog *v.* Hertzog, 1857, 29 Pa. St. 465, 468, in which he distinguishes constructive contracts from genuine implied contracts and defines the former as "fictions of law adapted to enforce legal duties by actions of contract, where no proper contract exists, express or implied." See also Professor Knowlton's article on the "Quasi Contractual Obligation of Municipal Corporations," 9 Mich. Law Rev. 671, in the opening paragraphs of which he says:

"We use the term 'quasi contract' in deference to writers on the science of jurisprudence and to many authors of works on technical law. Personally we do not like the term at all. The qualifying word *quasi* is too frequenty used when one is without an idea and wishes to say something, or has an idea but does not know how to express it. . . .

"We have constructive fraud, constructive trusts, constructive notice, and why not constructive contract, a contractual obligation existing in contemplation of law, in the absence of any agreement express or implied from facts?"

[3] For a statement of the reasons why the term "quasi contract" should not be abandoned, see Professor Corbin's article on "Quasi-Contractual Obligations," 21 Yale Law Jour. 533, 545.

[4] The use of the term "obligation" in reference to the general duty of all men not to trespass, steal, and so forth, is of doubtful propriety. "In English-speaking countries," says Sir Frederick Pollock (8 Harv. Law Rev. 188), "an unfortunate habit has arisen of using 'obligation' in a lax manner as coextensive with duties of every kind."

quasi contracts are superficially unlike the duty not to commit a tort, but are like most contracts in that the obligation is positive rather than negative; the obligor is required to act rather than to forbear.[1] A more substantial difference between quasi contracts and the duty not to commit a tort is that the former are what have been called particular obligations, *i.e.* obligations imposed because of a special state of facts (as, for instance, the receipt of money paid under mistake) and in favor of a particular person, while the latter is universal, *i.e.* an obligation or duty which rests upon one at all times and in favor of all persons, or at least all who may be affected by one's conduct. Whenever a certain person is under a particular quasi contractual obligation, it is correlated to a determinate right *in personam* of a certain other person; but the general duty a breach of which constitutes a tort is not correlated to any determinate right, either *in personam* or *in rem*, or to the right of any particular person — only to what may be called the general right *in rem* of every one that no tort shall be committed against him.

§ 6. (4) **Quasi contracts distinguished from equitable obligations proper.** — Quasi contracts are frequently referred to as equitable in character.[2] And they are equitable in the sense that, unlike most legal obligations, they rest not at all upon formal conceptions inherited from the days of more primitive law, but solely upon the universally recognized moral obligation of one who has received a benefit, the retention of which would be unjust, to make restitution. But they are legal obligations, rather than equitable, in the sense that they originated in the courts of law and are enforced by means of so-called legal as distinguished from equitable remedies. It is true that courts of equity, in the exercise of their jurisdiction to reform and rescind contracts, frequently enforce obligations to make resti-

[1] Ames, "History of Assumpsit," 2 Harv. Law Rev. 53, 63; Select Essays in Anglo-American Legal History, Vol. III, 259, 292: Keener, "Quasi-Contracts," p. 15.

[2] See, for examples, Moses *v.* Macferlan, 1760, 2 Burr. 1005; Western Assurance Co. *v.* Towle, 1886, 65 Wis. 247; 26 N. W. 104.

tution, but such obligations, while similar in many respects to those enforced at law, are not commonly regarded as a part of the law of quasi contracts and will not be treated in this book.

§ 7. (IV) **Essential elements of quasi contractual obligation.** — In order to establish the existence of a quasi contractual obligation it must be shown:

(1) That the defendant has received a benefit from the plaintiff.

(2) That the retention of the benefit by the defendant is inequitable.

There are certain cases, moreover, in which, notwithstanding the presence of both of the above elements, the courts refuse, on grounds of public policy, to recognize a legal obligation (*post*, §§ 87, 135, 156, 161, 187, 190).

§ 8. (1) **Receipt of a benefit.** — The word "enrichment" has been employed by previous writers to describe this element of quasi contractual obligation. But the term is unsatisfactory in that it connotes an actual increase of the defendant's estate. Such an increase of estate, as will be seen later, must sometimes appear (*post*, §§ 107, 189); but there are many cases, on the other hand, where it is sufficient to show that the defendant has received something desired by him, and the question whether he is thereby enriched in estate is irrelevant (*post*, §§ 107, 118, 119, 125). For example, if A renders services and furnishes material in the erection of a building for B under a supposed contract calling for such services and material, which contract for some reason is invalid, B is under a quasi contractual obligation to pay A the value of such services and material whether or not his property is enhanced in value.[1] The broader term "benefit," used in the sense of something desired by the defendant or something advantageous to him, but not necessarily an increase of his estate, seems preferable.

§ 9. (2) **Retention of benefit inequitable: Classification of quasi contracts.** — It is of the essence of quasi contractual obligation that the retention of the benefit received by the defendant would be unjust. In a large proportion of the reported

[1] Vickery *v.* Ritchie, 1909, 202 Mass. 247; 88 N. E. 835.

cases the presence of this element of obligation is the question in dispute; and since the answer to the question generally depends upon the circumstances under which the benefit is received or obtained, it is convenient to classify quasi contractual obligations according to the nature of such circumstances. Adopting this principle of classification, the subject falls into three grand divisions:

I. Benefits conferred in misreliance on a right or duty.
II. Benefits conferred through a dutiful intervention in another's affairs.
III. Benefits conferred under constraint.

Although, as a matter of analysis, the topic probably should be excluded from the field of quasi contract (see *post*, §§ 260, 270), it seems best to consider also:

IV. The action for restitution as an alternative remedy for repudiation or breach of contract, and for tort.

PART I

BENEFITS CONFERRED IN MISRELIANCE ON RIGHT OR DUTY

CHAPTER II

GENERAL PRINCIPLES

§ 10. Definition of misreliance.
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§ 15. Same: Negligent failure to ascertain facts.
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§ 17. (3) By compromise or settlement.
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§ 25. (5) Change of position by defendant.
§ 26. (*a*) Change of position must be irrevocable.
§ 27. (*b*) Payment over or settlement with principal as defense to agent.
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§ 29. (*d*) Beneficial disposition of money or goods not a defense.
§ 30. (*e*) Is accidental loss or theft of money or goods a defense?
§ 31. (*f*) Laches as a defense.
§ 32. (VI) When does cause of action arise? Necessity of demand.
§ 33. (VII) Running of statute of limitations.
§ 34. (VIII) Recovery of interest.

§ 10. **Definition of misreliance.** — The term "misreliance," coined by Professor Wigmore,[1] is used for the sake of convenient brevity to denote a reliance which results from a mis-

[1] "A Summary of Quasi-Contracts," 25 Am. Law Rev. 695, 696.

take of fact, *i.e.* an erroneous belief that a certain fact exists or will exist. By benefits conferred in misreliance on a right or duty, therefore, is meant benefits conferred under the inducement of an erroneous belief as to a fact essential to the existence of a duty, or to the existence or availability of a right.[1]

§ 11. (I) **Causes of misreliance: Mistake of fact and mistake of law.** — The word "fact," in the preceding section, is used in the broadest sense. As the word is ordinarily employed by courts and lawyers, however, what may be called "legal facts" are excluded. Questions of law, for example, are always distinguished from questions of fact.[2] Recognizing this distinction, misreliance on a right or duty may be said to result from either (1) a mistake of fact, or (2) a mistake of law. Thus, if A pays taxes to B under the belief that the payee is C, the person authorized by law to receive taxes, his mistake is one of fact; but if he pays them to B under the belief that B is authorized by law to receive taxes, whereas C is the person so authorized, his mistake is one of law. Upon principle there is no reason why a quasi contractural obligation should not be recognized in favor of one who has acted under a mistake of law as well as in favor of one who has acted under a mistake of fact. And in some classes of cases, as will be seen later (*post*, §§ 94, 134), no difference is recognized. It is nevertheless a widely accepted rule, based upon supposed considerations of public policy, that "money paid under a mistake of law cannot be recovered." The state of the law on this subject and the grounds for denying relief are examined in another chapter (*post*, § 35 *et seq.*).

§ 12. **Same: Mistake of anticipated fact.** — Cases frequently occur in which a benefit is conferred upon the assumption that a certain event will happen or that a certain present fact will continue to exist, which assumption proves to be erroneous. For example, freight is paid in advance upon the

[1] Though one is under an erroneous belief as to a certain fact, if such belief is not a controlling inducement to action, he cannot be said to rely upon it. See White *v.* Dotter, 1904, 73 Ark. 130; 83 S. W. 1052.

[2] For an admirable discussion of the distinction between questions of law and questions of fact, see Keener, "Quasi-Contracts," pp. 96–112.

assumption that the voyage will be completed, whereas it happens that the vessel is captured or lost *en route* (*post*, § 129). Such an erroneous assumption may be called a mistake of anticipated fact. It is clearly within the bounds of the general concept of misreliance.

§ 13. (II) **Misreliance negatived**: (1) **By knowledge or belief.** — One who either knows or believes that he is under no legal obligation to confer a certain benefit upon another and that he will acquire no right thereby, but nevertheless confers the benefit, cannot justly claim restitution upon the theory of misreliance:

National Life Insurance Company v. *Jones*, 1873, 1 Thomp. & C. (N. Y. Sup. Ct.) 466; *aff.* 59 N. Y. 649: Action to recover money paid by the company upon a policy of insurance. The grounds upon which recovery was sought were that the policy had been obtained by fraudulent representations and warranties. It appeared, however, that the officer of the company believed, at the time of payment, that the policy had been obtained by fraud, and paid the claim, "in part, because of the evil effect which a resistance of the claim would have upon the reputation of the company in the event of an unsuccessful resistance; also from some expected benefit, which, in some general way, might result to the company from prompt payment." TALCOTT, J. (p. 472): "The plaintiff believing that a good defense existed to the demand might be unwilling to encounter the risk of undertaking to prove it, might doubt whether it could be proved with sufficient clearness to secure a verdict, and for that reason have concluded that it was better to pay than to encounter a litigation which might prove unsuccessful. In such case a payment is not made under a mistake of fact, but upon the ground that, notwithstanding the fact, it is for the interest of the party paying to make the payment. So, too, the finding that the payment was made not in reliance upon a false belief as to the facts, but from other motives, inclining the plaintiff to the belief that it was for its interest to assume the false state of facts to be true, and pay without further question or inquiry is a sufficient ground for sustaining the decision. If the payment be not solely in reliance upon a falsely assumed state of facts, but from mixed motives, so that the payer, while not believing the assumed state

of facts, voluntarily waives all investigation or inquiry in view of, and influenced by other motives to the payment, he has not paid on the faith of a false state of facts, and thereby influenced to the payment, but upon other considerations."

Windbiel v. *Carroll*, 1878, 16 Hun (N. Y. Sup. Ct.) 101: Action to recover money paid on a mortgage, upon the ground that it was an overpayment. LEARNED, P.J. (p. 103): "Ignorance of a fact is one thing; ignorance of the means of proving a fact is another. When money voluntarily paid is recovered back, it is because there was a mistake as to some fact. But here the plaintiff was not mistaken as to the fact. Only at the time he did not know how to prove it. The subsequent discovery of evidence to prove a fact, known to the party when he makes the payment, cannot authorize a recovery back of the money. Such a principle would be most dangerous."[1]

In Tennessee, however, it has been held that nothing short of knowledge or "moral certainty" will negative misreliance:

Guild v. *Baldridge*, 1852, 2 Swan (32 Tenn.) 294: Action to recover money alleged to have been paid under a mistake of fact. The plaintiff purchased logs from one Manning for which he in part paid Manning and took his receipt. Some years later a constable had in his hands executions against Manning, the proceeds of which were to be paid over to the defendant. Manning had promised the constable to let the plaintiff have some logs to discharge the executions, so the constable called upon the plaintiff and requested payment. On two occasions the plaintiff told the constable that he thought he had paid Manning, and finally in the presence of the defendant the plaintiff said that "he believed he had paid the debt, but that he had nothing to show payment; and as Manning was dead he would have no bad feelings about it, and rather than have them he would pay it again." The trial court instructed the jury that "if the plaintiff, believing that he had paid the debt to Manning but choosing to pay it again rather than be supposed to withhold

[1] See also Stokes *v.* Lewis, 1785, 1 Term R. 20; Holt *v.* Thomas, 1894, 105 Cal. 273; 38 Pac. 891; Citizens' Bank *v.* Rudisill, 1908, 4 Ga. App. 37; 60 S. E. 818; Frambers *v.* Risk, 1877, 2 Ill. App. 499, 504; Mowatt *v.* Wright, 1828, 1 Wend. (N. Y.) 355; 19 Am. Dec. 508. But see Bond *v.* Hays, 1815, 12 Mass. 34.

it, paid the money to the defendant, as the creditor of Manning, without any understanding with the defendant that the money should be refunded in any event, then the plaintiff would not be entitled to recover." But this instruction was held improper by the Supreme Court, which declared (McKinney, J., writing the opinion, p. 302) that a recovery could not be resisted "on the ground that the plaintiff, at the time of payment, may have entertained and expressed a vague belief, resting on no evidence and amounting to nothing like conviction or moral certainty, that he had previously paid the debt. The authorities cited require that he shall have had knowledge of the facts, and that term must be used in its ordinary sense."

§ 14. **Same: Forgotten facts.** — The knowledge or belief that negatives misreliance is a knowledge or belief present to the mind at the time the benefit is conferred. One who has forgotten a fact once known to him, or believed by him, and consequently falls into an erroneous conception of his right or duty, is just as much entitled to relief as if he had never known the fact. If it were held otherwise, "a man's rights would depend upon the strength of his memory": [1]

Kelly v. *Solari*, 1841, 9 Mees. & Wels. 54: Action by a director of an insurance company to recover money paid on a policy. The directors who paid the money had been informed that the policy had lapsed by reason of the non-payment of a premium, but they testified that at the time of paying the money they had entirely forgotten that the policy had lapsed. Lord Abinger, C.B. (p. 58): "I certainly laid down the rule too widely to the jury, when I told them that if the directors once knew the facts, they must be taken still to know them, and could not recover by saying that they had since forgotten them. I think the knowledge of the facts which disentitles the party from recovering must mean a knowledge existing in the mind at the time of payment."

Citizens' Bank v. *Rudisill*, 1908, 4 Ga. App. 37; 60 S. E. 818: Powell, J. (p. 41): "The word 'knowledge,' when applied in this connection, is not, however, used in the broad sense in

[1] Birchard, J., in Narman *v.* Will, 1846, 1 Ohio Dec. 261; 5 West. Law Jour. 508.

which it is sometimes used. A man may have a fact in memory, but at a given moment his faculty of recollection may not present it to him. For example, you pay a debt, and, being a conscious agent, you, of course, possess the cognition of the fact. Your memory stores it away. Later your creditor presents his demand again. Though in the broad sense knowing that you have paid it, and though still holding that fact dormant in your memory, yet not recalling it — that is, forgetting it — you pay it again. In such cases, for the purposes of the principles we are discussing, you are not considered as having knowledge of the fact." [1]

§ 15. **Same: Negligent failure to ascertain facts.** — Analogous to the case of one who forgets a fact affecting his legal right or duty, is that of one whose ignorance is due to his failure to avail himself of means of knowledge. No matter how close at hand the means of knowledge may be, no matter how stupid or careless the failure to ascertain the truth may be, if one confers a benefit under an honest mistake, *i.e.* in unconscious ignorance of the truth, the retention of the benefit is ordinarily inequitable. By the weight of authority restitution may be enforced:

Kelly v. *Solari*, 1841, 9 Mees. & Wels. 54: PARKE, B. (p. 59): "but if it [money] is paid under the impression of the truth of a fact which is untrue, it may, generally speaking, be recovered back, however careless the party paying may have been, in omitting to use due diligence to inquire into the fact."

Rutherford v. *McIvor*, 1852, 21 Ala. 750: DARGAN, C.J. (p. 756): "I cannot yield my assent to the proposition, that the means of ascertaining the real facts of the case are tantamount to actual knowledge of them. If this were the rule, then it would be but rare that money paid by mistake could ever be recovered back. For instance: if, in the settlement of an account, a mistake in

[1] *Accord:* Lucas *v.* Worswick, 1833, 1 Moody & Rob. 293; Lewellen *v.* Garrett, 1877, 58 Ind. 442; 26 Am. Rep. 74; Simms *v.* Vick, 1909, 151 N. C. 78; 65 S. C. 621; 24 L. R. A. (N. S.) 517. And see Johnson *v.* Saum, 1904, 123 Ia. 145; 98 N. W. 599; Guild *v.* Baldridge, 1852, 2 Swan (32 Tenn.) 294; Perry *v.* Newcastle, etc., Ins. Co., 1852, 8 U. C. Q. B. 363, 367.

the calculation was made, it could not be afterward corrected by suit, because the parties, having competent knowledge of figures, had the means of knowledge; and the mistake being the result of negligence, rather than the want of knowledge, the parties would be bound to abide by it." [1]

[1] Also: Townsend *v.* Crowdy, 1860, 8 C. B. N. S. 477; Brown *v.* Tillinghast, 1897, 84 Fed. 71 (C. C., Wash.); Merrill *v.* Brantly, 1902, 133 Ala. 537; 31 So. 847; Devine *v.* Edwards, 1881, 101 Ill. 138; Brown *v.* College Corner, etc., Road Co., 1877, 56 Ind. 110; Fraker *v.* Little, 1880, 24 Kan. 598; 36 Am. Rep. 262; First Nat. Bank *v.* Behon, 1891, 91 Ky. 560; 16 S. W. 368; 13 Ky. Law Rep. 148; Baltimore, etc., R. Co. *v.* Faunce, 1847, 6 Gill (Md.) 68; 46 Am. Dec. 655; Appleton Bank *v.* McGilvray, 1855, 4 Gray (Mass.) 518; 64 Am. Dec. 92; Pingree *v.* Mutual Gas Co., 1895, 107 Mich. 156; 65 N. W. 6; Koontz *v.* Central Nat. Bank, 1873, 51 Mo. 275; Dobson *v.* Winner, 1887, 26 Mo. App. 329 (see, however, Union Savings Assn. *v.* Kehlor, 1879, 7 Mo. App. 158, 165); Douglas County *v.* Keller, 1895, 43 Neb. 635; 62 N. W. 60; Waite *v.* Leggett, 1828, 8 Cow. (N. Y.) 195; 18 Am. Dec. 441; Kingston Bank *v.* Eltinge, 1869, 40 N. Y. 391; 100 Am. Dec. 516; Hathaway *v.* County of Delaware, 1906, 185 N. Y. 368, 370; 78 N. E. 153; 13 L. R. A. (N. S.) 273; 113 Am. St. Rep. 909; Payne *v.* Witherbee, Sherman & Co., 1909, 132 App. Div. 579; 117 N. Y. Supp. 15; Simms *v.* Vick, 1909, 151 N. C. 78; 65 S. E. 621; 24 L. R. A. (N. S.) 517 (*cf.* Brummitt *v.* McGuire, 1890, 107 N. C. 351; 12 S. E. 191); James River Nat. Bank *v.* Weber, 1910, 19 N. D. 702; 124 N. W. 952; McKibben *v.* Doyle, 1896, 173 Pa. St. 579; 34 Atl. 455; 51 Am. St. Rep. 785; Houston, etc., R. Co. *v.* Hughes, 1911, Tex. Civ. App. ; 133 S. W. 731; City Nat. Bank *v.* Peed, 1899, (Va.) 32 S. E. 34. And see Johnson *v.* Saum, 1904, 123 Ia. 145; 98 N. W. 599; Guild *v.* Baldridge, 1852, 2 Swan (32 Tenn.) 294.

The following cases in one degree or another decline to go to the full extent of the principle: Grymes *v.* Sanders, 1876, 93 U. S. 55; East-Haddam Bank *v.* Scovil, 1837, 12 Conn. 303, 310; Stanley Rule & Level Co. *v.* Bailey, 1878, 45 Conn. 464, 466, ("There may be such full and complete means of knowledge as to be equivalent to knowledge itself."); West *v.* Houston, 1844, 4 Harr. (Del.) 170, ("Where there is a payment in ignorance of a fact, it may be recovered back, unless the mistake arises from the negligence of the party to examine and take notice of information within his full means of knowledge."); Board of Commrs. *v.* Gregory, 1873, 42 Ind. 32; Norton *v.* Marden, 1838, 15 Me. 45, 47; 32 Am. Dec. 132, ("But it is insisted that the plaintiff had the means of correct knowledge. And, in one sense a person may be said always to have the means of knowledge. He may have access to books, and to the assistance and instructions of his fellow men. But the means of knowledge which the law requires are such as the party may avail himself of as then present, without calling to his aid other assistance."); Ash *v.* McLellan, 1905, 101 Me. 17; 62

There are some cases, however, as will appear later, in which the equities are so nearly equal that if it appears that the plaintiff's mistake was the result of his own negligence, the scales will be tipped against him and he will be denied relief (*post*, § 25).

§ 16. (2) **By doubt: Assumption of risk.** — One who entertains a doubt as to the existence, present or future, of a certain fact, cannot be said to believe in and rely upon that fact. If he acts with any doubt that the fact exists or will exist, he is consciously "taking a chance." And if it develops that his doubt was well founded, he cannot justly claim to be the victim of a mistake. It follows that if the fact doubted, but assumed to be true, was essential to the existence of a duty or the availability of a right, he cannot claim to have acted in misreliance on such right or duty. Thus, if A pays money to B on account of a bill for services rendered although suspecting that he has already paid it or doubting whether the services have actually been rendered, he assumes the risk that by reason of the previous payment or of the nonperformance of the service, he is under no duty to make the payment. So, if A contracts unconditionally to make certain improvements upon B's premises, though doubtful of his ability to obtain some of the materials required for such improvements, he assumes the risk that by reason of a failure to obtain such materials he will

Atl. 598; Alton *v.* First Nat. Bank, 1892, 157 Mass. 341, 344; 32 N. E. 228; 18 L. R. A. 144; 34 Am. St. Rep. 285, ("A mistake as to a fact . . . would not warrant a recovery, when, as here, the fact was a matter equally open for the inquiry and judgment of both parties, and the defendant had a right to assume that the plaintiff relied wholly on his own means of information."); Advertiser, etc., Co. *v.* City of Detroit, 1880, 43 Mich. 116; 5 N. W. 72; Wheeler *v.* Hatheway, 1885, 58 Mich. 77; 24 N. W. 780 (*cf.* Pingree *v.* Mutual Ins. Co., 1895, 107 Mich. 156; 65 N. W. 6); Peterborough *v.* Lancaster, 1843, 14 N. H. 382, 389; Brummitt *v.* McGuire, 1890, 107 N. C. 351; 12 S. E. 191, 193, ("Nor, if the payment be made in ignorance or mistake of fact, can it be recovered back, where the means of knowledge or information is in reach of the party paying, and he is negligent in obtaining it."); First Nat. Bank *v.* Taylor, 1898, 122 N. C. 569; 29 S. E. 831; Stevens *v.* Head, 1837, 9 Vt. 174; 31 Am. Dec. 617; Simmons *v.* Looney, 1896, 41 W. Va. 738; 24 S. E. 677, 678–9.

not acquire a contract right to compensation. In either case, if A's suspicion or doubt turns out to have been well founded, he is not entitled to restitution. B, it is true, has received something for nothing; but why should a court of law assist A to recover what he has consciously risked and lost?

This incompatibility of assumption of risk with misreliance has not always been detected.[1] The question is most likely to be raised in cases of benefits conferred in part performance of a contract by one who fails to complete his performance. For a further discussion, therefore, the reader is referred to the chapters dealing with contracts unenforceable because of impossibility of performance (*post*, § 112 *et seq.*), and contracts unenforceable because of the plaintiff's breach (*post*, § 164 *et. seq.*).

§ 17. (3) **By compromise or settlement.** — If there is a difference of opinion between A and B as to the existence of a fact essential to an obligation from A to B, and a compromise is effected between them, A cannot, upon learning that his belief in the nonexistence of the fact was well founded, recover a benefit conferred pursuant to such compromise.[2] His belief in

[1] In Chatfield *v.* Paxton, a case cited in Bilbie *v.* Lumley, 1802, 2 East 469, 471, and briefly reported in a note to that case, ASHHURST, J., is said to have expressed the opinion that "where a payment had been made not with full knowledge of the facts, but only under a blind suspicion of the case, and it was found to have been paid unjustly, the party might recover it back again." But, according to Lord ELLENBOROUGH, "it was so doubtful at last on what precise ground the case turned that it was not reported." See also Guild *v.* Baldridge, 1852, 2 Swan (32 Tenn.) 294, which is stated and quoted, *ante*, § 13.

[2] Troy *v.* Bland, 1877, 58 Ala. 197; Jones *v.* Fulwood, 1852, 12 Ga. 121; Thompson *v.* Nelson, 1867, 28 Ind. 431; New York Life Ins. Co. *v.* Chittenden, 1907, 134 Ia. 613, 620; 112 N. W. 96; 11 L. R. A. (N. S.) 233, 237; 120 Am. St. Rep. 444; Carter *v.* Iowa, etc. Loan Ass'n, 1907, 135 Ia. 368; 112 N. W. 828; Brooks *v.* Hall, 1887, 36 Kan. 697; 14 Pac. 236; Stuart *v.* Sears, 1875, 119 Mass. 143; Lamb *v.* Rathburn, 1898, 118 Mich. 666; 77 N. W. 268; Pearl *v.* Whitehouse, 1872, 52 N. H. 254; Moore *v.* Fitzwater, 1824, 2 Rand. (Va.) 442. See Bennett *v.* Bates, 1884, 94 N. Y. 354, 373; Sears *v.* Grand Lodge, 1900, 163 N. Y. 374; 57 N. E. 618; 50 L. R. A. 204; Consolidated Fruit Jar Co. *v.* Wisner, 1905, 103 App. Div. 453; 93 N. Y. Supp. 128, 131. *Cf.* Worth *v.* Stewart, 1898, 122 N. C. 258; 29 S. E. 579.

the nonexistence of the fact is convincing evidence that there was no misreliance, but that the benefit was conferred from some other motive, *e.g.* to avoid litigation or dispute. Moreover, to permit a recovery would be utterly to destroy the stability of compromise contracts.

The foregoing considerations apply with equal force where there is no difference of opinion between A and B as to the existence of the fact, but where both are in doubt as to its existence. If they choose to settle upon certain terms, without ascertaining the truth, A cannot, upon learning that the fact did not exist, recover a benefit conferred pursuant to the settlement.[1]

Care must be taken, in these cases of compromise and settlement, to distinguish the case in which the fact disputed or doubted turns out to have been nonexistent, and the case in which another fact, essential to the obligation but *not* doubted, turns out to to have been nonexistent. In the latter case, there is a genuine misreliance upon a supposed duty and a benefit conferred pursuant to the compromise or settlement may be recovered: ✔

Rheel v. *Hicks*, 1862, 25 N. Y. 289: Action to recover money paid to the defendant, the county superintendent of the poor. One Louisa Hehr had testified that she was pregnant and that the plaintiff was the father of the unborn child. The plaintiff was arrested and in compromise of the claim for the support of the child paid fifty dollars to the defendant. It subsequently developed that Louisa Hehr had not been pregnant, and this action was brought. WRIGHT, J. (p. 291): "The plaintiff was charged with being the father of a child likely to be born a bastard, of which Louisa Hehr was alleged to be pregnant. Both the plaintiff and defendant acted upon an erroneous assumption that she was pregnant, and they compromised relative to the support of the child that, it was supposed, would be born a bastard and become chargeable to

[1] See New York Life Ins. Co. *v.* Chittenden, 1907, 134 Ia. 613, 620; 112 N. W. 96; 11 L. R. A. (N. S.) 233, 237; 120 Am. St. Rep. 444; Kowalke *v.* Milwaukee Elec., etc., Co., 1899, 103 Wis. 472; 79 N. W. 762; 74 Am. St. Rep. 877.

the county. . . . The fact as to who was the father of the child may have been waived by the compromise, but not the vital fact which gave it all its force and without the existence of which the superintendent had no power to act, viz. the pregnancy of Louisa Hehr. There was no disagreement or compromise between the plaintiff and the defendant as to the fact of pregnancy. They both believed and acted upon the assumption that she was pregnant, and it turns out that they were both mistaken. As there was no pregnancy, the county has not been put to any expense, and never can be, and as the plaintiff paid his money to indemnify the county under a mistake of fact, I think he was entitled to maintain this action." [1]

Wheadon v. *Olds*, 1838, 20 Wend. (N. Y.) 174: Action to recover a portion of the money paid for a quantity of oats. The defendant agreed to sell to the plaintiff from 1600 to 2000 bushels of oats at 49 cents per bushel. The delivery of the oats was commenced by removing them from a storehouse to a canal boat; tallies were kept, and when the tallies amounted to 500, it was proposed to guess at the remainder; and after a while it was agreed between the parties to call the whole quantity 1900 bushels, and the plaintiff accordingly paid for that quantity at the stipulated price. When the oats came to be measured it was ascertained that there were only 1488 bushels delivered. It was then found that the mistake had happened by both parties assuming as the basis of the negotiation fixing the quantity of 1900 bushels, that 500 bushels had been loaded in the boat at the time when they undertook to guess at the residue, whereas in fact only 250 bushels had been loaded, — the tallies representing *half bushels* and not *bushels*, — and that the parties supposed that the quantity loaded was not a quarter of the whole quantity. The vendor refusing to refund a portion of the money received by him, this action was brought by the purchaser, who declared for money had and received. COWEN, J. (p. 176): "All the excess of payment arose from a count of *half bushels* as *bushels*. And the only question in the least open is, whether an agreement, based on that mistake, to

[1] *Cf.* Lawton *v.* Campion, 1854, 18 Beav. 87, 97–8; Thompson *v.* Nelson, 1867, 28 Ind. 431, in which the dispute compromised was as to the fact of pregnancy, and not as to the fact of fatherhood.

accept the oats at the plaintiff's own risque of the quantity, shall conclude him. The mistake which entitles to this action, is thus stated by the late Chief Justice Savage from the civil law: 'An error of fact takes place, either when some fact which really exists is unknown, or *some fact is supposed to exist which really does not exist.*' . . . In judging of its legal effect, we must look 'to the regard which the contractors have had to the fact which appeared to them to be true.' And when we see that the agreement is the result of such a regard, or, as the judge said to the jury, is based upon it, I am not aware of any case or dictum, that because part of the agreement is *to take at the party's own risque*, or, as the parties expressed it, here, hit or miss, it therefore forms an exception to the general rule. The agreement to risk was, *pro tanto*, annulled by the error." [1]

Care must be taken also to distinguish a settlement made by way of compromise or without regard to the actual facts and a settlement made by one who, though at first doubtful of his obligation, satisfies himself by an investigation of the facts that the claim against him is valid, only to learn, after the settlement, that his original doubt was well founded. In the latter case, the benefit is conferred by one who, at the time, is conscious of no doubt and consequently assumes no risk. It is a benefit conferred in misreliance upon a supposed duty, and the retention of the benefit is inequitable.

The distinction just pointed out appears to have been overlooked in a Michigan case:

McArthur v. *Luce*, et al., 1880, 43 Mich. 435; 5 N. W. 451; 38 Am. Rep. 204. The defendants demanded in good faith, that the plaintiff pay them for logs cut upon their land. "When the claim was made upon the plaintiff he employed a surveyor and they went upon the land, and the plaintiff then became satisfied that he had cut and taken logs from off the defendants' land, and authorized a settlement to be made, which was done. This was in 1871 and all parties rested in the belief that a correct settlement had been made until sometime in 1875, when a new survey established the fact that no logs had

[1] *Cf.* Calkins *v.* Griswold, 1877, 11 Hun (N. Y. Sup. Ct.) 208.

been cut upon the defendants' land, and this action was brought to recover back the moneys paid, upon the claim of having been paid under a mistake of fact." The court denied relief, Chief Justice MARSTON saying (p. 437): "Where a claim is thus made against another who, not relying upon the representations of the claimant, has the opportunity to and does investigate the facts, and thereupon becomes satisfied that the claim made is correct and adjusts and pays the same, I think such settlement and payment should be considered as final. If not, it is very difficult to say when such disputed questions could be considered as finally settled, or litigation ended. In the settlement of disputed questions where both parties have equal opportunity and facilities for ascertaining the facts, it becomes incumbent on each of them to make his investigation, and not carelessly settle trusting to future investigation to show a mistake of fact and enable him to recover back the amount paid. One course encourages carelessness and breeds litigation after witnesses have passed beyond the reach of the parties: the other encourages parties in ascertaining what the facts and circumstances actually are while the transaction is fresh in the minds of all, and a final and peaceful settlement thereof." [1]

In the first place it should be said that since the plaintiff "employed a surveyor and they went upon the land" it cannot fairly be assumed that he "carelessly" settled. And in the second place, even if he did carelessly settle, since at the time he settled he had resolved any previous doubt he may have entertained and fully believed that he was under a duty to pay the defendants' claim, the payment was made, neither by way of compromise of a dispute, nor without regard to the real facts, but in misreliance upon a supposed duty which turned out to be nonexistent. Even if the decision rests upon the ground that the plaintiff was negligent in failing to ascertain the truth, it is believed to be unsound, though not without the support of other cases (*ante*, § 15). If negligence is not imputed to the plaintiff, it is difficult to conceive of a clearer case of quasi contractual obligation.

[1] See also Carlisle *v.* Barker, 1876, 57 Ala. 267; Wheeler *v.* Hatheway, 1885, 58 Mich. 77; 24 N. W. 780.

§ 18. (III) **Misreliance on right or duty, as distinguished from policy.** — It is sometimes said that money paid or other benefits conferred under a mistake of fact cannot be recovered if the mistake is as to a *collateral* or *extrinsic* fact. The words " collateral " and " extrinsic," as here used, however, are too indefinite. What is generally meant — and this seems a more illuminating statement of the rule — is that unless the fact mistaken by the bestower of the benefit is one essential to the existence of his legal duty, or to the existence or enforceability of his legal right, there is no obligation on the recipient to make restitution.

The effect of this limitation is to prevent a recovery by one who confers a benefit under the inducement of a mistake of fact which affects merely the *policy* of his act. And the reason for denying relief in such cases is that by the common understanding of mankind one must accept the responsibility of determining in advance whether or not a proposed transaction is to his advantage. If it turns out to his disadvantage, whether because he failed accurately to evaluate a material fact or because, consciously or unconsciously, he was ignorant of a material fact, he must suffer the loss. He will not be permitted to withdraw from his engagement, if unperformed; nor will he be restored to his original position if he has already performed. The other party to the transaction, it is true, may profit by his error of judgment or his ignorance, but in the absence of fraudulent representation or concealment, the profit is not an illegitimate one, and there is no obligation to make restitution.

The following cases illustrate the point:

Harris v. *Loyd*, 1839, 5 Mees. & Wels. 432: Action to recover money paid by the plaintiff, an assignee under a trust deed for the benefit of creditors, to the defendant, a sheriff, to release goods from an execution which had been levied by the defendant to satisfy a judgment against the plaintiff's assignor. After the goods were released from the execution they were taken from the plaintiff by an assignee in bankruptcy appointed because of an act of bankruptcy committed by the plaintiff's assignor

before the assignment. The plaintiff sought to recover upon the ground that he was induced to make the payment by a mistake of fact, since he did not know, at the time of the payment, that the act of bankruptcy had been committed. Lord ABINGER, C.B. (p. 436): "The short answer, however, to the action is that the money was not paid under a mistake of fact [*i.e.* such a mistake of fact as entitles the plaintiff to relief], but upon a speculation, the failure of which cannot entitle the plaintiffs to recover it back." ALDERSON, B. (p. 436): "This is money paid, not under a mistake, but under *a bargain*. True, it turns out to be a bad bargain; but that will not affect its validity."

Aiken v. *Short, Executrix*, 1856, 1 Hurl. & Nor. 210: Action by a bank to recover money paid. The defendant's testator had a claim against one George Carter, which was secured by a bond and an equitable mortgage on property devised to George by what was supposed to be Edwin Carter's last will. George Carter subsequently mortgaged the same property to the bank. The defendant applied to George Carter for payment of the testator's claim, and was referred to the bank. The bank paid the debt to get rid of the equitable mortgage, but subsequently discovering that Edwin Carter made a later will by which George did not take the property mortgaged, brought this action to recover the amount paid. BRAMWELL, B. (p. 215): "In order to entitle a person to recover back money paid under a mistake of fact, the mistake must be as to a fact which, if true, would make the person paying liable to pay the money; not where, if true, it would merely make it desirable that he should pay the money. It is impossible to say that this case falls within the rule."

Buffalo v. *O'Malley*, 1884, 61 Wis. 255; 20 N. W. 913; 50 Am. Rep. 137: Action to recover money claimed to have been overpaid by the plaintiff to the defendant for the transportation of tanbark. The terms or the contract were that the defendant was to be paid two dollars per cord for carrying the bark to Duluth. The plaintiff measured the bark as it was piled at the place of shipment, found that there were sixty-three cords, allowed three cords for shrinkage and paid for the carriage of sixty cords. The bark was badly curled, however, and when it reached Duluth it was so piled for sale, according to the customary manner of piling badly curled bark, as to measure

only forty cords. The plaintiff was ignorant of the fact that "where bark was curled badly it was customary to make allowance for it in the measurement when sold; or to pile the bark tight by tramping it down and filling up the holes." COLE, C.J. (p. 257): "It is needless to observe, courts do not relieve against every mistake a party may make in his business transactions. A mistake in a matter of fact, to be the ground of relief, must be of a material nature, inducing or influencing the agreement, or in some matter to which the contract is to be applied. It is obvious the mistake which the plaintiff made was in supposing that curled bark, piled in the loose manner his bark was piled, would hold out in measure when piled as dealers required. But this was a mistake as to a collateral fact, which had nothing to do with the contract of carriage. It is said the plaintiff paid for the carriage upon the belief that there were sixty cords of it, and that his belief was founded upon his having measured the bark on the bank. He certainly was not mistaken as to the quantity of the bark on the bank, but was mistaken in supposing that a dealer would take it at Duluth piled in the manner he had piled it."

In all of the cases above stated the plaintiff was induced by a mistake of fact to pay money which otherwise, presumably, he would not have paid. But in all of them the fact mistaken was one which affected merely the policy of paying the money, not his legal duty to pay the money nor his legal right to something in return for the money. There are other cases in which, with more or less clearness, the same distinction is taken.[1]

[1] Cleveland Cliffs Iron Co. *v.* East Itasca, etc., Co., 1906, 146 Fed. 232, 237–8; 76 C. C. A. 598; Brooks *v.* Hall, 1887, 36 Kan. 697; 14 Pac. 236; First Nat. Bank *v.* Burkham, 1875, 32 Mich. 328; Langevin *v.* City of St. Paul, 1892, 49 Minn. 189, 196; 51 N. W. 817; 15 L. R. A. 766; Southwick *v.* First Nat. Bank, 1881, 84 N. Y. 420, 434; Youmans *v.* Edgerton, 1883, 91 N. Y. 403, 411. And see Holt *v.* Thomas, 1894, 105 Cal. 273; 38 Pac. 891; Segur *v.* Tingley, 1835, 11 Conn. 134; Lemans *v.* Wiley, 1883, 92 Ind. 436; Sears *v.* Leland, 1887, 145 Mass. 277; 14 N. E. 111; Needles *v.* Burk, 1884, 81 Mo. 569, 573; 51 Am. Rep. 251; Franklin Bank *v.* Raymond, 1829, 3 Wend. (N. Y.) 69; Dambmann *v.* Schulting, 1878, 75 N. Y. 55.

In Franklin Bank *v.* Raymond, *supra*, where money was paid in ignorance of a fact which gave the payor a set-off, the court said (p. 72): "The general principle of law is indisputable, that if a party

The Kentucky case of *Tucker* v. *Denton*[1] is of interest in this connection. The plaintiff's parents having entered into a contract for the sale of their farm to the defendants and having become dissatisfied with the transaction, the plaintiff paid eight hundred dollars to the defendant for the release of her parents from their contract. Subsequently the plaintiff discovered that the form of the written contract was such that it was unenforceable under the Statute of Frauds, and she brought this action to recover the money paid for its cancellation. Since the contract for the sale of the farm was valid even though unenforceable, and imposed at least a moral obligation upon the plaintiff's parents so long as it remained uncanceled, it would seem that the plaintiff received just what she paid for, *i.e.* the cancellation of the contract, and that her only mistake was as to the worth of the contract and consequently as to the policy of paying eight hundred dollars for its cancellation. But the court took the view that either the defendants were guilty of fraud in concealing the unenforceability of the contract for the sale of the farm or there was such a mutual mistake as to the existence of the fact of enforceability as to invalidate the contract (see *post*, § 59), and in either case the plaintiff was entitled to restitution.

pays money under a mistake of the real facts, without any negligence imputable to him for not knowing them, he may recover back such money. What sort of facts are meant? Such facts, I apprehend, as shew that the demand on which the money was paid did not actually exist against the person paying at the time the money was paid." In Dambmann *v.* Schulting, *supra*, the court said (p. 64): "There are many extrinsic facts surrounding every business transaction which have an important bearing and influence upon its results. Some of them are generally unknown to one or both of the parties, and if known, might have prevented the transaction. In such cases, if a court of equity could intervene and grant relief, because a party was mistaken as to such a fact which would have prevented him from entering into the transaction if he had known the truth, there would be such uncertainty and instability in contracts as to lead to much embarrassment. As to all such facts, a party must rely upon his own circumspection, examination and inquiry; and if not imposed upon or defrauded, he must be held to his contracts. In such cases, equity will not stretch out its arm to protect those who suffer for the want of vigilance."

[1] 1907, 106 S. W. 280 (Ky.).

§ 19. (IV) **Misreliance on right against or duty to third person.** — Is there an obligation to make restitution of a benefit conferred under the inducement of a mistake as to one's legal relation, not with the recipient of the benefit, but with a third person? In a few cases, the question is answered, apparently without qualification, in the negative:

Chambers v. *Miller*, 1862, 13 C. B. N. S. 125: Action for assault and imprisonment. The plaintiff presented a check at the defendants' bank, which defendants' cashier paid. Before the plaintiff left the bank, it was discovered that the account of the drawer was overdrawn, whereupon the return of the money was demanded. The plaintiff at first refused, but was detained until he made repayment. The defendants justify the detention upon the ground, *inter alia*, that the money was legally recoverable from the plaintiff. ERLE, J. (p. 133): "The plaintiff had taken possession of the money, counted it once, and was in the act of counting it again, when the clerk, who had gone from the counter, finding that there was a mistake, not as between him and the bearer of the check, but as between him and the customer, returned and claimed to revoke the act of payment which on his part was already complete, and claimed to have the money back. . . . But, as between the parties here, there was no manner of mistake."

Merchants' Insurance Co. v. *Abbott*, 1881, 131 Mass. 397: Assumpsit for money had and received by the defendants, Denny, Rice & Co., under an insurance policy of which they were assignees. After the insurance had been paid it was discovered that the building insured had been destroyed at the instigation of the original holder of the policy before the assignment. The defendants knew that the building had been burned, but were not aware of their assignor's fraud. GRAY, C.J. (p. 401): "The only contract of the plaintiffs was with Abbott [the assignor], and the only mistake was between them and him. . . . In other words, the money was paid by the plaintiffs to these defendants, not as a sum which the latter were entitled to recover from the plaintiffs, but as a sum which the plaintiffs admitted to be due to Abbott, under their own contract with him, and which at his request and in his behalf they paid to these defendants, who at the time of receiving it

knew no facts tending to show that it had not in truth become due from the plaintiffs to Abbott. . . . As between the plaintiffs and these defendants, there was no fraud, concealment or mistake." [1]

Upon principle there is a distinction between a mistake as to legal relations with a third person which affects merely the policy of conferring the benefit, and a mistake as to such legal relations which affects either the *duty* of conferring the benefit, or a *right* to be acquired by conferring it. In *Harris* v. *Loyd*, stated in the preceding section, where the plaintiff's mistake was as to his rights under a deed of trust from a third person, he was led by his mistake to believe that it would be to his interest to pay money to the defendant for the release of certain goods from execution, but he was not led to believe that he was under a legal duty to release the goods from the defendant's execution, or that he would acquire a legal right by so doing. The same is true of *Aiken* v. *Short*, also stated in the preceding section, where the plaintiff's mistake as to his rights under a mortgage given to him by a third person induced him, as a matter of policy only, to pay a claim of the defendant. But in *Chambers* v. *Miller*, *supra*, and *Merchants' Insurance Company* v. *Abbott*, *supra*, where the plaintiff's mistake was as to his obligation to a third person to pay money to the defendant, he was induced by his mistake to believe, not merely that it would be good policy to pay the money, but that he was bound to pay the money. To say, in such cases, that the money is paid under a mistake as to a collateral or extrinsic fact, or a mistake as to the payer's legal relation with a third person, is to beg the question. The money is paid in misreliance upon a supposed legal duty, and not merely under a mistake as to policy, and it is submitted that in the absence of special circumstances justifying the

[1] See also Southwick *v.* First Nat. Bank, 1881, 84 N. Y. 420; Ball *v.* Shepard, 1911, 202 N. Y. 247; 95 N. E. 719, 721, ("The mistake . . . must arise in the transaction between the parties to the action."); Johnson *v.* Boston, etc., R. Co., 1897, 69 Vt. 521; 38 Atl. 267 (services).

retention of the benefit, the payor is equitably entitled to restitution.[1]

§ 20. (V) **Circumstances justifying retention of benefit.** — The retention of a benefit conferred in misreliance upon a right or duty is generally inequitable. Certain circumstances, however, have been recognized by the courts as justifying a refusal to make restitution. Most of the cases fall within one or another of the following groups:

(1) Where the plaintiff has been guilty of serious misconduct toward the defendant.

(2) Where the plaintiff, though mistaken as to his legal right or duty, was under a moral obligation to confer the benefit.

(3) Where the plaintiff received something of value from the defendant in exchange for the benefit conferred, and though able to return the same *in specie* has failed to do so.

(4) Where, in consequence of the mistake and at the defendant's expense, the plaintiff reaped a benefit equivalent in value to that conferred upon the defendant.

(5) Where the defendant is free from responsibility for the plaintiff's mistake, or is responsible in no greater degree than the plaintiff, and has so changed his position that the enforcement of restitution would subject him to loss.

§ 21. (1) **Plaintiff guilty of misconduct toward defendant.** — Upon the principle that finds expression in the maxim of equity, "He who comes into equity must come with clean hands," restitution should not be enforced in favor of one who, in the course of the transaction giving rise to his claim, was guilty of serious misconduct toward the person from whom he seeks to recover. The point has been made against one who willfully violates an enforceable contract or who refuses to proceed with the performance of a contract which is unenforceable under the Statute of Frauds. The question will therefore be considered in the chapters dealing with the obligation to make

[1] See McClary *v.* Michigan, etc., R. Co., 1894, 102 Mich. 312; 60 N. W. 695, in which a recovery was allowed for services rendered under a mistake as to the plaintiff's contractual duty to a third person.

restitution in those two classes of cases (*post*, §§ 93 *et seq.*, 162 *et seq.*).

§ 22. (2) **Plaintiff under moral obligation to confer benefit.** — One who, while under a moral obligation to confer a certain benefit upon another, confers it because he mistakenly supposes that he is under a *legal* obligation so to do, or because he mistakenly supposes that he will acquire a legal right by so doing, is not entitled to restitution. For there is nothing inequitable in the retention of a benefit to which the recipient is morally entitled, even though it is conferred by mistake:

Farmer v. *Arundle*, 1772, 2 Wm. Bl. 824: Action by the overseer of the parish of Grimley to recover money paid to the overseer of the parish of St. Martin's for the support of a pauper. The plaintiff had certificated the pauper to the defendant, but in this action contended that the defendant could not have enforced against the plaintiff a claim for the pauper's support. De Gray, C.J. (p. 825): "When money is paid by one man to another on a mistake either of fact or of law, or by deceit, this action will certainly lie. But the proposition is not universal, that whenever a man pays money which he is not bound to pay, he may by this action recover it back. Money due in point of honour or conscience, though a man is not compellable to pay it, yet if paid, shall not be recovered back: as a *bona fide* debt, which is barred by the statute of limitations. Put the *form* of the certificate out of the case, it is however evidence at all events, that the parish of Grimley have acknowledged the pauper to be their parishioner. And it is allowed, that he has been maintained four years by the parish of St. Martin's. Admitting, therefore, that this money could not have been demanded by the defendant (which it is not now necessary to decide), yet I am of opinion that it is an honest debt, and that the plaintiff, having once paid it, shall not, by this action, which is considered as an equitable action, recover it back again."

Pensacola, etc., R. Co. v. *Braxton*, 1894, 34 Fla. 471; 16 So. 317: Action for cattle killed by defendant's engines, etc. The defendant pleaded as a set-off that its agent, by mistake, had delivered to the plaintiff a voucher for $22.50 which had been intended for another person of the same name. The plaintiff

admitted the receipt of the voucher, but testified that he thought it was in payment of a claim for $25, that he had presented for the killing of an ox, which claim was not included in the present action. TAYLOR, J. (p. 481): "The law seems to be settled that money paid under a mistake of facts cannot be reclaimed, where the plaintiff has derived a substantial benefit from the payment, nor where the defendant received it in good faith in satisfaction of an equitable claim, nor where it was due in honor and conscience. The right to recovery in such cases turns upon the question as to whether the party receiving the money paid by mistake can, in good conscience, retain it. According to the plaintiff's evidence, he had a just and legal claim against the defendant for an ox wrongfully killed by it, amounting to $25, and of which he had notified the defendant, demanding payment thereof. He received the voucher for $22.50 without fraud upon his part, but in good faith, believing it was his, and that it was given him in payment of his claim, and he so appropriated it. His claim seems never to have been settled otherwise. Under these circumstances, we do not think that the retention of the money by him necessarily involved any smartings of good conscience." [1]

[1] Also: Munt *v.* Stokes, 1792, 4 Term R. 561, (Action to recover money paid in satisfaction of a respondentia bond. The bond was given by the plaintiff's testator, as master of a Danish vessel, as security for a loan. When the plaintiff paid the money he did not know that, since his testator was neither a natural born subject nor a denizen who had taken the oath of allegiance, the bond could not have been enforced. Judgment for the defendant.); Platt *v.* Bromage, 1854, 24 L. J. Exch. 63, (POLLOCK, C.B. (p. 65): "If a man has two creditors, and, intending to pay one he by mistake pays the other, he cannot get the money back again."); Monroe Nat. Bank *v.* Catlin, 1909, 82 Conn. 227; 73 Atl. 3; Strange *v.* Franklin, 1906, 126 Ga. 715; 55 S. E. 943; Illinois Trust, etc., Bank *v.* Felsenthal, 1888, 26 Ill. App. 624, (Action to recover money paid on two checks. The checks were given to H. as part of a loan on his note and deed of trust. They were drawn in favor of B. and Z., two contractors who were mistakenly supposed to have claims or liens on the land conveyed by the deed of trust. H., instead of delivering them to B. and Z., forged their names as indorsees and sold the checks to the defendants who collected them. In fact B. and Z. had no claims on the land conveyed by the deed of trust, so H. was the equitable owner of the checks and passed his equitable title to the defendants. Judgment for defendants.); Hubbard *v.* City of Hickman, 1868, 4 Bush (67 Ky.) 204; 96 Am. Dec. 297; Walker *v.* Conant, 1888, 69 Mich. 321; 37

N. W. 292; 13 Am. St. Rep. 391; Foster *v.* Kirby, 1862, 31 Mo. 496, 499, (Action to recover overpayment on note. Held, that if plaintiff "did owe the amount paid, it is immaterial that the note was for a less amount; if he paid only what was justly due, he can recover no part of it back."); Ashley *v.* Jennings, 1892, 48 Mo. App. 142, (Action to recover $150 paid under the mistaken belief that two checks given by plaintiff to defendant — one for $277.08 and the other for $276.90 — had been refused payment by the bank. As a matter of fact only one of the checks had been refused payment. Judgment for defendant.); Buel *v.* Boughton, 1846, 2 Denio (N. Y.) 91, (The plaintiff had agreed to make a note payable *with interest*, but interest was left out by mistake in drawing it. Supposing the note to have been written with interest the plaintiff paid interest on it, and subsequently discovering his mistake, sued to recover the interest paid. Judgment for the defendant, BRONSON, C.J., saying: "The plaintiff first omitted, by mistake, to make the note payable with interest, as he should have done; and then, by another mistake, he corrected the first error by paying interest, when the note itself imposed no such obligation. And thus by two blunders the parties have come out right at last."); Jackson *v.* McKnight, 1879, 17 Hun (N. Y. Sup. Ct.) 2, (Action to recover a payment of interest on an overdue bond and mortgage. As a matter of fact the interest had been paid before. After the second payment but before the plaintiff's demand for restitution the defendant assigned the mortgage. Judgment for defendant, LEARNED, P.J., saying: "The difficulty is that, at the time when the plaintiff made this payment, he was owing the defendant a much larger amount, overdue and payable on the very obligation upon which this payment was made. Clearly, if the plaintiff had handed the defendant $230 to apply on the bond and mortgage, he could not have recovered that sum back. But in this present case he claims to recover, because it was intended as a payment of interest which had, in fact, been paid; and not as a payment of principal, which had not. The payment, however, was really made on the debt. The plaintiff is, and always will be, entitled to a credit for so much paid thereon." For an extended criticism of this decision, questioning the correctness of the court's assumption that the plaintiff would always be entitled to a credit for the amount paid, see Keener, "Quasi-Contracts," pp. 52–8.); *cf.* Mayor, etc., of New York *v.* Erben, 1868, 38 N. Y. 305; s.c. 3 Abb. App. Dec. 255, (Where an award was made to a property owner by commissioners appointed to assess damages and awards in the matter of improving streets, and by the mistake of a clerk the property owner was overpaid, he could not resist an action to recover the overpayment by showing that the amount received by him was no more than fair compensation. The question of the amount of the award having been intrusted exclusively to the commissioners, subject to appeal, the court had no jurisdiction to examine the question in this action.); Morris *v.* Tarin, 1785, 1 Dall. (Pa.) 147; 1 Am. Dec. 233. And see Alton *v.* First Nat. Bank, 1892, 157 Mass. 341; 32 N. E. 228; 18 L. R. A. 144; 34 Am. St. Rep. 285.

But see, *contra*, Sheridan *v.* Carpenter, 1872, 61 Me. 83, (Plaintiff

There is a dictum in the New York case of *Franklin Bank* v. *Raymond*[1] which seems to carry this limitation somewhat too far. The action was on a promissory note and the defendants, by way of set-off, claimed to have paid another note by mistake. It appeared that the defendants had given this last-mentioned note to one Bailey, who had sold it before maturity to the Hoboken Bank but had failed, inadvertantly, to indorse it. The Hoboken Bank had sent the note to the plaintiff for collection and it had been paid by the defendants. Shortly after paying the note the defendants discovered that it had not been indorsed by Bailey to the Hoboken Bank and consequently that a claim which they had against Bailey might have been set off against the note in the hands of the holder. They immediately demanded the return of the money paid to the plaintiff, which refused to refund and credited the Hoboken Bank with the collection. The court properly refused to allow the defendants' claim, for since the failure to indorse the note was inadvertant the defendant was morally bound not to insist upon his set-off against the purchaser and it was therefore not against conscience for the purchaser or its agent to retain the money. But in the course of its opinion, the court said: "The debt paid by the defendants was one that subsisted against them at the time of payment. The fact of which they were ignorant, did not shew that there was no debt existing at the time; it only shewed that they were in a situation which enabled them to set off against the demand they had paid, a demand due to them from Bailey. I do not find any case

was payee of a note supposed to be the note of St. Paul's parish. He sold it as such to defendant and was subsequently obliged to pay it as indorser. After payment plaintiff discovered that the note was originally so drawn as to be the personal note of the treasurer of the parish and had been altered so as to appear to be a parish note after its purchase by defendant. Plaintiff then brought this action to recover the money paid to defendant and was allowed to recover, notwithstanding the fact that after its alteration the note was what he supposed it to be when he took it and when he sold it to defendant, and what defendant supposed he was buying. See criticism of this decision, Keener, "Quasi-Contracts," pp. 47–9.).

[1] 1829, 3 Wend. (N. Y.) 69, 73.

where money paid on a subsisting demand has been recovered back on the ground that the person making the payment had subsequently discovered facts that shew he had a set-off against the demand."

Apparently the attention of the court had not been called to the case of *Bize* v. *Dickason*,[1] in which Lord MANSFIELD permitted the recovery of money paid to an assignee in bankruptcy by one who had a claim against the bankrupt which might have been set off against the assignee's demand. In the latter case, it is true, the plaintiff's mistake was one of law, and for that reason relief would now, in most jurisdictions, be denied. But Lord MANSFIELD was clearly right in his conclusion that as between a debtor and his creditor, or one standing in the shoes of his creditor, the former is under no moral obligation to pay more than the balance due after deducting any set-off that he may have, and consequently, if, by mistake, he pays an amount in excess of such balance, its retention by the creditor is against conscience.[2]

§ 23. (3) **Plaintiff's failure to place defendant in statu quo.** — If, in exchange for the benefit conferred upon the defendant, the defendant gives something of value to the plaintiff which the plaintiff, when he discovers his mistake, is able to return *in specie*, it is not against conscience for the defendant to retain the benefit received by him until such restitution is made:

Levy v. *Terwilliger*, 1881, 10 Daly (N. Y. C. P.) 194: Action to recover $150 paid by the plaintiff's agent to the defendant for a safe which the agent mistakenly supposed the plaintiff had agreed to buy from the defendant. As a matter of fact the plaintiff had agreed to buy a safe from another dealer of the

[1] 1786, 1 Term R. 285.

[2] See Keener, "Quasi-Contracts," p. 51: "As between the debtor and the original creditor the difference in amount between the two debts represents what in conscience should be paid by the one to the other. And the fact that in our system of law one claim does not extinguish the other, and must be pleaded, not as payment, but by way of set-off or counter-claim, does not prove that a creditor receiving in such circumstances, not the amount of his debt less the set-off, but the entire amount of his claim, has not in conscience received more than he should keep."

same name. The defendant, misled by the action of the plaintiff's agent, had shipped a safe to the plaintiff. C. P. DALY, C.J. (p. 199): "It certainly is not against conscience that the defendant should, in this case, retain the price paid to him after having parted with the safe, when the plaintiff, through whose act and negligence it was shipped, has never made any effort to get it from the vessel and restore it to the defendant, but without doing or offering to do anything to repair what he himself brought about, asks the court to compel the defendant to restore to him the $150." [1]

If that which the plaintiff receives from the defendant is of no value or advantage to the defendant whatever, its return is unnecessary.[2] But it has been held that a grantee who would recover money paid for a conveyance of land under a mistake as to the grantor's title must tender a reconveyance, since otherwise any title that the grantor might subsequently acquire would vest in the grantee,[3] and likewise that one who would recover land exchanged for mining stock must return the certificates of stock, if genuine, although the stock is of no intrinsic or market value.[4]

What if the benefit received by the plaintiff cannot be restored to the defendant *in specie?* Suppose, for instance, that the benefit consists of goods which the plaintiff sells or consumes before he learns of his mistake. Or, suppose that the benefit consists of services rendered—something which can-

[1] Also: Lemans *v.* Wiley, 1883, 92 Ind. 436, 441, ("This note is not shown to have been a worthless thing, and we know of no rule of law or equity which will sanction her holding it, and recovering of appellant what she paid for it."); Coolidge *v.* Bingham, 1840, 1 Met. (Mass.) 547, (a genuine note with forged indorsements); Northampton Nat. Bank *v.* Smith, 1897, 169 Mass. 281; 47 N. E. 1009; 61 Am. St. Rep. 283, (check which bank had been instructed not to pay).

[2] Kent *v.* Bornstein, 1866, 12 Allen (Mass.) 342, (counterfeit bill); Brewster *v.* Burnett, 1878, 125 Mass. 68; 28 Am. Rep. 203, (counterfeit U. S. bonds); Martin *v.* Home Bank, 1899, 160 N. Y. 190; 54 N. E. 717; *aff.* 30 App. Div. 498; 52 N. Y. Supp. 464, (valueless check); Paul *v.* City of Kenosha, 1867, 22 Wis. 266; 94 Am. Dec. 598, (void bond issued by defendant).

[3] Moyer *v.* Shoemaker, 1849, 5 Barb. (N. Y. Sup. Ct.) 319, 322.

[4] Bassett *v.* Brown, 1870, 105 Mass. 551.

not be restored *in specie* under any circumstances. It is only fair, in such cases, to allow the plaintiff to recover to the extent that the benefit received by the defendant exceeds in value that received by the plaintiff. Such is the law,[1] though where the action for restitution is employed not to recover benefits conferred by mistake but as an alternative remedy for the breach of a contract, it is held, by the weight of authority, that if the plaintiff cannot place the defendant *in statu quo* he cannot recover (*post*, § 265).

§ 24. (4) **Plaintiff's receipt of equivalent benefit.** — If the plaintiff, not by way of exchange, yet in consequence of the mistake and at the defendant's expense, reaps a benefit equivalent in value to that conferred upon the defendant, restitution should not be enforced. This is exemplified in the case of *Kingston Bank* v. *Eltinge*,[2] which was an action to recover money paid by a sheriff, with the plaintiff's consent, to the defendant. The plaintiff and the defendant both had judgments against one Elmendorf, execution had issued on both judgments, and certain property had been sold. The plaintiff consented to the payment of the proceeds of the sale to the defendant in the belief that the sale had been under the defendant's execution, whereas in fact the defendant's execution had expired and the sale had been under the plaintiff's. But it further appeared

[1] Day *v.* New York, etc., R. Co., 1873, 51 N. Y. 583, (Plaintiff had been given business of feeding and keeping stock transported by defendant, in consideration of conveyance of land, and building of cattle pens, etc. The contract was unenforceable under the Statute of Frauds; defendant defaulted; this action was to recover benefit derived by defendant from plaintiff's performance. Said the court (p. 592): "It was not necessary for the plaintiff to tender the profits to the defendant before the commencement of the action. They were part of the consideration received by him for his conveyance, and he has the same right to hold them as if so much money had been paid to him by the defendant. His claim is against the defendant for the balance, if any, of the value of the land."); Lawton *v.* Howe, 1861, 14 Wis. 241, (Plaintiff had received void school land certificates which he had surrendered to the commissioners for cancellation.). For additional cases see *post*, § 106.

[2] 1876, 66 N. Y. 625, 627. See also Dickey County *v.* Hicks, 1905, 14 N. D. 73; 103 N. W. 423; De Pauw Plate Glass Co *v.* City of Alexandria, 1898, 152 Ind. 443; 52 N. E. 608.

that the defendant, upon receipt of the money so paid, had canceled his judgment, which had been a prior lien on Elmendorf's real estate, and the plaintiff had subsequently realized from a sale of the real estate so released a sum at least equivalent to that paid under mistake to the defendant. Under these circumstances it was properly held that, "as the plaintiff was not entitled to recover unless it was against conscience for defendant to retain the money, and as defendant received no more than his due and thereupon relinquished a lien from which plaintiff derived full as much benefit as if it had itself received the money, plaintiff, on this ground alone, was not entitled to recover."

If the benefit received by the plaintiff as a result of his mistake is less in value than that conferred upon the defendant, restitution should be enforced, of course, to the extent of the difference.

§ 25. (5) **Change of position by defendant.** — Ordinarily, by restoring a benefit conferred in misreliance upon a right or duty, one merely places himself in the position where he would have been if the mistake had not been made. In other words restitution ordinarily entails no loss to the defendant. But what if the defendant, because of the receipt of the benefit and before learning of the plaintiff's mistake, gives up property, surrenders a right against a third person, or otherwise so acts — so "changes his position," as the courts usually put it — that restitution will not place him where he would have been if the mistake had not been made but will subject him to positive loss? The answer to this question depends upon the responsibility for the plaintiff's mistake:

1. If the mistake is attributable solely or chiefly to some negligent act or omission of the defendant or his agent, it is but just that the defendant rather than the plaintiff should suffer a loss. Restitution, therefore, should be enforced.

Cases of this class are comparatively infrequent, but in all that have been found relief has been granted.[1]

2. If responsibility for the mistake cannot fairly be laid at the

[1] Union Bank *v.* U. S. Bank, 1807, 3 Mass. 74; Koontz *v.* Central Nat. Bank, 1873, 51 Mo. 275, (Plaintiff paid draft under impression that

defendant's door, or if his fault is no greater than the plaintiff's, the retention of the benefit by the defendant is not against conscience. To refuse to enforce restitution, it is true, is to subject the plaintiff to a loss; but justice would not be served by shifting the loss to the shoulders of a defendant who is either less at fault than the plaintiff, or at least no more blameful, and who, but for the plaintiff's mistake, would not have changed his position.

Where it appears that the plaintiff alone was negligent, or that his fault was greater than the defendant's, this doctrine is accepted without question.[1] Where it appears that neither

she was the drawee. The draft was in reality against another person and was presented to the plaintiff by the mistake of defendant. Notwithstanding the fact that defendant had paid over the money to its principal and the further fact that the drawee had become insolvent, plaintiff was allowed to recover. The decision was not rested, however, upon the ground that the mistake was caused by defendant's negligence.); Phetteplace *v.* Bucklin, 1893, 18 R. I. 297; 27 Atl. 211, (Payment of lapsed legacy to personal representative of legatee who distributed the money according to the legatee's will. MATTESON, C.J.: "When a person pays money in ignorance of circumstances with which the receiver is acquainted, and which if disclosed would have prevented the payment, the parties do not deal on equal terms and the money is held to be unfairly obtained and may be recovered. The testimony on the part of the defendant does not negative such a state of facts, and certainly, if such a state of facts existed, it would not be inequitable to permit the plaintiff to recover, even if the defendant had paid the money to others before demand for its repayment."); Metcalf *v.* Denson, 1874, 4 Baxt. (63 Tenn.) 565, (Plaintiff overpaid to defendants a judgment obtained against him in favor of defendants' client, the mistake being the result of the defendants' failure to inform plaintiff of a payment previously made upon the judgment by one who was indebted to plaintiff. Notwithstanding the fact that the defendants had remitted the money to their client, it was held that they must make restitution.). See Newall *v.* Tomlinson, 1871, L. R. 6 C. P. 405, (Plaintiffs overpaid defendants for cotton, the mistake being the result of an erroneous computation of weight by defendants' clerk. Defendants settled with their principals before the mistake was discovered, but a recovery was allowed. BOVILL, C.J.: "The mistake originated with the defendants themselves, and they alone are responsible." The decision rests mainly, however, upon other grounds.); Clark *v.* Eckroyd, 1886, 12 Ont. App. Rep. 425. See also cases of payment of a forged bill to one who should have discovered the forgery, *post*, § 92.

[1] German Security Bank *v.* Columbia, etc., Trust Co., 1905, 27 Ky. Law Rep. 581; 85 S. W. 761, (Defendant lost right against indorsers by running of statute of limitations.); Pelletier *v.* State Nat. Bank, 1906,

party was negligent, or that they were equally negligent, restitution has in a few cases been enforced;[1] but there is reason to hope that these cases will not be followed,[2] and they are

117 La. 335; 41 So. 640, (Wife paid debt of husband to prevent sale of seized property under mistaken impression that it belonged to her: as a result of payment, the defendant lost the benefit of the seizure and had its writ returned.); Wilson *v.* Barker, 1862, 50 Me. 447, (Defendant discharged a mortgage.); Walker *v.* Conant, 1887, 65 Mich. 194; 31 N. W. 786; 1888, 69 Mich. 321; 37 N. W. 292; 13 Am. St. Rep. 391, (Money paid on forged note and mortgage; defendant lost her note and mortgage and "therefore lost the power that the possession of these papers might have given her in the collection of her debt." But see dissenting opinion, 69 Mich. 329.); Continental Nat. Bank *v.* Tradesmen's Bank, 1903, 173 N. Y. 272; 65 N. E. 1108, (Plaintiff negligently certified and paid a raised draft; defendant paid money over to depositor.); Fegan *v.* Great Northern R. Co., 1899, 9 N. D. 30; 81 N. W. 39, (Plaintiff, a station agent, paid money to make good a defalcation mistakenly supposed to have occurred during his administration; as a result of payment, defendant lost right of indemnity on bond of his predecessor.); Atlantic Coast Line R. Co. *v.* Schirmer, 1910, 87 S. C. 309; 69 S. E. 439, (Plaintiff paid claim for loss of goods shipped by defendant, and later discovered that goods had been delivered to consignee. Consignee had quit business and disappeared, so defendant could not collect from him.); Richey *v.* Clark, 1895, 11 Utah 467; 40 Pac. 717, (Defendant lost rights against third person.). And see Deutsche Bank *v.* Beriro and Co., 1895, 73 L. T. R. 669; Maher *v.* Millers, 1878, 61 Ga. 556; 34 Am. Rep. 104; Guild *v.* Baldridge, 1852, 2 Swan (32 Tenn.) 294, 303.

[1] Durrant *v.* Ecclesiastical Commrs., 1880, 6 Q. B. D. 234, (Plaintiff, by mistake, paid tithe rent in respect of land not in his occupation. The mistake was not discovered for two years and the defendants consequently lost their remedy against the lands actually chargeable.); Kingston Bank *v.* Eltinge, 1869, 40 N. Y. 391; 100 Am. Dec 516, (As a consequence of a payment under mistake the defendant had canceled a judgment and thereby lost a security.). See Koontz *v.* Central Nat. Bank, 1873, 51 Mo. 275, (Both parties appear to have been negligent, but the defendant perhaps in greater degree than the plaintiff.); Corn Exchange Bank *v.* Nassau Bank, 1883, 91 N. Y. 74; 43 Am. Rep. 655; Clark *v.* Eckroyd, 1886, 12 Ont. App. Rep. 425, (Defendants misdirected goods shipped to plaintiffs and they were sold by the carrier to pay charges. Plaintiffs, by mistake, paid for goods. The parties appear to have been about equally at fault, but the court intimates that the defendants' fault was the greater.); Bank of Toronto *v.* Hamilton, 1898, 28 Ont. 51; Phetteplace *v.* Bucklin, 1893, 18 R. I. 297; 27 Atl. 211.

[2] Durrant *v.* Ecclesiastical Commrs., *supra*, has been criticized as inconsistent with earlier English cases. See Keener, "Quasi-Contracts,"

already at least equalled in number by the cases which deny relief.[1]

§ 26. (*a*) **Change of position must be irrevocable.** — It should be emphasized that change of position alone is not a defense — the change must be irrevocable. This point, which appears in some decisions to have been overlooked, is brought out with great clearness in a Rhode Island case:

pp. 66, 67; Costigan, "Change of Position as a Defense," 20 Harv. Law Rev. 205, 216. Kingston Bank *v.* Eltinge, *supra*, has also been criticized by Professor Keener ("Quasi-Contracts," pp. 67–70); and Professor Costigan declares (20 Harv. Law Rev. 215, n. 4) that the later New York cases "are not unfriendly to a change," citing Continental Nat. Bank *v.* Tradesmen's Bank, 1903, 173 N. Y. 272, [65 N. E. 1108], and Nat. Park Bank *v.* Seaboard Bank, 1889, 114 N. Y. 28, [20 N. E. 632; 11 Am. St. Rep. 612], to which may be added, Hathaway *v.* County of Delaware, 1906, 185 N. Y. 368; 78 N. E. 153; 13 L. R. A. (N. S.) 273; 113 Am. St. Rep. 909; and Ball *v.* Shepard, 1911, 202 N. Y. 247; 95 N. E. 719. It should also be noted that upon an appeal from a second trial of Kingston Bank *v.* Eltinge, it having appeared that not only had the defendant relinquished a lien but such relinquishment had resulted in a benefit to the plaintiff as great as that received by the defendant, the right to restitution was denied. Kingston Bank *v.* Eltinge, 1876, 66 N. Y. 625.

[1] Crocker-Woolworth Bank *v.* Nevada Bank, 1903, 139 Cal. 564; 73 Pac. 456; 63 L. R. A. 245; 96 Am. St. Rep. 169, (Plaintiff paid a raised check on an indorsement so restricted that the defendant was held not liable as a general indorser or as representing that it was genuine. Defendant, before learning of the error, paid the money over to its customer. HENSHAW, J.: "The governing principle is this: that where equally innocent persons have dealt with one another under a mistake, the burden of loss resulting from the common error ordinarily will be left where the parties themselves have placed it, and so a recovery can only be had where in equity and good conscience the defendant should be called upon to refund."); Behring *v.* Somerville, 1899, 63 N. J. L. 568; 44 Atl. 641; 49 L. R. A. 578, (Money paid to second mortgagee instead of first; defendant surrendered his assignment and lost his legal hold upon the bond and mortgage as security for his claim against the assignor. See criticism of this case, 13 Harv. Law Rev. 530.); Union Bank of Lower Canada *v.* Ontario Bank, 1880, 24 Lower Can. Jur. 309; Boas *v.* Updegrove, 1847, 5 Pa. St. 516; 47 Am. Dec. 425, (Terre-tenant paid judgment mistakenly supposed to be lien on land; as a result, judgment discharged.) See Citizens Bank *v.* Rudisill, 1908, 4 Ga. App. 37; 60 S. E. 818; Pensacola, etc., R. Co. *v.* Braxton, 1894, 34 Fla. 471; 16 So. 317.

Phetteplace v. *Bucklin*, 1893, 18 R. I. 297; 27 Atl. 211: The surety on an executor's bond, after the malversation and insolvency of his principal, paid the representatives of a legatee who, without leaving lineal descendants, predeceased the testator, and whose legacy had thus lapsed, the death of the legatee being unknown to the surety. The representative of the legatee distributed the money according to the legatee's will, after which the surety brought action against him to recover the amount paid. The defendant contended that since he had paid over the money, the enforcement of restitution would be inequitable, but the court said (p. 301): "It is possible that a simple request to the legatees, accompanied by a statement of the facts showing the injustice of their retention of the money, would result in their returning it to be restored to the plaintiff. Until all reasonable efforts have been made by the defendant to get back the money and have proved unavailing, how can it be said that it would be inequitable to permit a recovery?" [1]

§ 27. (*b*) **Payment over or settlement with principal as a defense to agent.** — The rule is established that money paid to an agent by mistake may not be recovered from him if, before learning of the mistake, he pays it over to his principal.[2] That this is thought to rest upon the ground of an irrevocable change of position by the agent is indicated by the existence of a correlative rule that payment over to his principal after notice of the plaintiff's claim for its return is no defense.[3] But if the

[1] See also Lawrence *v.* American Nat. Bank, 1873, 54 N. Y. 432, 436, (The defendant had discharged sureties but was nevertheless required to make restitution. The court said that the defendant could avoid its discharge of sureties on the ground of mistake and resort to them for so much as it was compelled to pay the plaintiff. "Hence it is not clear that the defendant will suffer any damage on account of plaintiff's mistake.").

[2] Holland *v.* Russell, 1861, 1 Best & Sm. 424, *aff.* 4 Best & Sm. 14; Shand *v.* Grant, 1863, 15 C. B. N. S. 324; Hooper *v.* Robinson, 1878, 98 U. S. 528; Yarborough *v.* Wise, 1843, 5 Ala. 292; Maher *v.* Millers, 1878, 61 Ga. 556; 34 Am. Rep. 104; Granger *v.* Hathaway, 1869, 17 Mich. 500. See Martin *v.* Allen, 1907, 125 Mo. App. 636; 103 S. W. 138.

[3] Buller *v.* Harrison, 1777, Cowp. 565; Griffith *v.* Johnson's Admr., 1837, 2 Harr. (Del.) 177; Law *v.* Nunn, 1847, 3 Ga. 90, 93; McDonald

agent's defense is really that of irrevocable change of position, why should he not be required to prove not only a payment over to his principal, but his inability, because of the principal's insolvency or for some other reason, to obtain reimbursement? A better reason for denying relief against the agent would seem to be that since a payment to an agent is in legal contemplation a payment to his principal, it is the principal and not the agent who benefits by the mistake. And if this be true, the agent certainly does no wrong in putting his principal into possession of the money even after the receipt of notice that a claim for restitution, equitable in its nature, has been made.

As a logical consequence of the distinction made by the courts between payment over before notice and payment over after notice, it is held that the mere act of crediting the amount received upon the principal account, before notice, will not protect the agent, for the account may easily be corrected,[1] but the crediting of the amount to the principal, followed by a settlement of accounts between the principal and agent, before notice, is a defense, for such a settlement is equivalent to payment.[2]

To the rule that payment over by an agent before notice of the mistake is a defense, the case of a defendant agent who purports to deal as principal is said to constitute an exception.[3] The reason for this exception is said by Professor Keener to be

v. Napier, 1853, 14 Ga. 89, 96; Garland *v.* Salem Bank, 1812, 9 Mass. 408; 6 Am. Dec. 86; Jefts *v.* York, 1852, 10 Cush. (Mass.) 392, 396; O'Connor *v.* Clopton, 1882, 60 Miss. 349; Hearsey *v.* Pruyn, 1810, 7 Johns. (N. Y.) 179. See Elliott *v.* Swartwout, 1836, 10 Pet. (U. S.) 137, 154; Mowatt *v.* McLelan, 1828, 1 Wend. (N. Y.) 173.

[1] Buller *v.* Harrison, 1777, Cowp. 565; Cox *v.* Prentice, 1815, 3 Maule & Sel. 344; Kerrison *v.* Glyn, Mills, Currie & Co., 1909, 26 T. L. R. 37; Deisch *v.* Wooten-Agee Co., 1910, 95 Ark. 279; 129 S. W. 819; LaFarge *v.* Kneeland, 1827, 7 Cow. (N. Y.) 455.

[2] Holland *v.* Russell, 1861, 1 Best & Sm. 424, 434, *aff.* 1863, 4 Best & Sm. 14; Mowatt *v.* McLelan, 1828, 1 Wend. (N. Y.) 173.

[3] Newall *v.* Tomlinson, 1871, L. R. 6 C. P. 405; United States *v.* Pinover, 1880, 3 Fed. 305; Smith *v.* Kelley, 1880, 43 Mich. 390; 5 N. W. 437; Canal Bank *v.* Bank of Albany, 1841, 1 Hill (N. Y.) 287; Merchants' Bank *v.* McIntyre, 1849, 2 Sandf. (N. Y. Superior Ct.) 431.

that the agent who has dealt as a principal cannot claim "that in paying the money over to a party, who in fact sustained the relation of principal to him, he had paid the money to the person to whom the plaintiff intended to pay it at the time when he made the payment to the defendant." [1] But the defendant can claim that he actually received the money as a mere agent, that he paid it over to the person to whom he was in duty bound to pay it, and that if he is compelled to pay again to the plaintiff the hardship will be just as great as in the case of an agent who deals as such. Professor Costigan suggests that the exception rests upon an implied warranty by the agent that he is and will remain a principal, and a consequent estoppel to set up a payment over.[2] But he concedes that the courts have not expressly stated that there is a warranty of principalship, and no cases have been found in which an action for the breach of such a warranty has been maintained. The agent, it is true, may be sued on the contract which he has made; but that his obligation is solely upon the contract itself and as a party thereto, and not upon an implied warranty of principalship, is evidenced by the fact that a judgment against the undisclosed principal, though unsatisfied, leaves no remedy against the agent.[3]

§ 28. (*c*) **Payment over as a defense to an executo or administrator.** — Payment over, before notice, is said to be a defense to an executor or administrator as well as to an agent.[4] But there is this significant difference — an executor or administrator must show not only that he has applied the money received by him to the payment of creditors, legatees, or distributees, but that the condition of the estate was such, when he learned of the

[1] "Quasi-Contracts," p. 62.

[2] "Change of Position as a Defense," 20 Harv. Law Rev. 211.

[3] It seems particularly unreasonable to hold that there is an implied warranty of principalship in a case where, as in Newall *v.* Tomlinson, *supra*, and Canal Bank *v.* Bank of Albany, *supra*, the agent is of a class the members of which customarily deal as principals but are known to act, generally, on behalf of others.

[4] Beam *v.* Copeland, 1890, 54 Ark. 70; 14 S. W. 1094; Grier *v.* Huston, 1822, 8 Serg. & R. (Pa.) 402; 11 Am. Dec. 627. See Phetteplace *v.* Bucklin, 1893, 18 R. I. 297; 27 Atl. 211.

mistake, that he could not reimburse himself.[1] And in one case it is said that he must show that a reasonable effort has been made to induce the persons to whom he paid the money to return it.[2]

§ 29. (*d*) **Beneficial disposition of money or goods not a defense.** — The consumption, sale, or other beneficial disposition by the defendant of that which he received, or, in the case of money received, its payment out for the benefit of the defendant, does not constitute such a change of position as justifies a refusal to make restitution in value.[3] The distinction between payment over to a principal, which is a defense, and payment out for the benefit of the defendant, which is not, is well stated in an English case:

Continental Caoutchouc & Gutta Percha Company v. *Kleinwort, Sons & Company,* 1904, 20 Times L. R. 403; 90 L. T. R. 474: The defendant had advanced money to Kramrisch and Co., on the security of the shipping documents or bills of lading of certain parcels of rubber. Upon the sale of the rubber to the plaintiffs the defendants had released the bills of lading under an agreement that the price should be paid by the plaintiff to the defendants and applied by the defendants on the advances made by them. Plaintiff by mistake overpaid the defendants, and the defendants credited the amount received to Kramrisch and Co.'s account, and notified Kramrisch who acknowledged and approved what they had done. The court held that the plaintiff was entitled to recover, COLLINS, M.R., saying (p. 405): "It is clear law that *prima facie* the person to whom money has been paid under a mistake of fact is liable to

[1] Grier *v.* Huston, 1822, 8 Serg. & R. (Pa.) 402; 11 Am. Dec. 627.

[2] Phetteplace *v.* Bucklin, 1893, 18 R. I. 297; 27 Atl. 211.

[3] In Standish *v.* Ross, 1849, 3 Exch. 527, the court said (p. 534): "It is in respect of the delay of the remedy only that the defendant could not be put *in statu quo.* We think these circumstances form no impediment to the right to recover, if money were paid over under an ordinary mistake of fact; it could not be any bar to the recovery of it, that the defendant had applied the money in the meantime to some purchase which he otherwise would not have made, and so could not be placed *in statu quo.*" As to consumption of goods supposed by the recipient to be a gift, see *post,* § 57.

refund it, even though he may have paid it away to third parties in ignorance of the mistake. He has had the benefit of the windfall and must restore it to the true owner. On the other hand, it is equally clear that an intermediary who has received money for the purpose of handing it on to a third party and has handed it on is no longer accountable to the sender. In such a case he is a mere conduit-pipe and has not had the benefit of the windfall. . . . Now, in this case it is quite clear that, as between Kleinwort, Sons, and Co. and Kramrisch, the former were the persons primarily entitled to receive the purchase-money of the goods in respect of which they had released the bills of lading. Had the sum due from the buyer been deposited with a third party and become the subject of an interpleader issue between Kramrisch and the defendants, it must, I think, have been awarded to the defendants. For these reasons I think that the defendants in respect of the sum claimed are in no better position than any other persons who have received for their own benefit money paid to them under a mistake of fact." [1]

In this connection the Texas case of *Houston & Texas Central Railway Company* v. *Hughes* [2] is of interest. The action was brought to recover an alleged overpayment to a contractor for the construction of roadbed. The defense was that the contractor had distributed the overpayment to subcontractors *on estimates of their work made by the plaintiff* and that the whereabouts of such subcontractors was unknown. The court held that even if these facts were established the plaintiff was entitled to recover. In support of the decision it may be admitted that the contractor was not, like an agent, a mere conduit through which the money passed from the railroad company to the subcontractors. And if the overpayment received by the contractor had been expended in the payment of valid claims against him, or even if it had been expended, under a mistake of the contractor for which the railroad company was not primarily responsible, in the payment of invalid claims, the decision would not be open to criticism. But since the de-

[1] See also Moors *v.* Bird, 1906, 190 Mass. 400, 410; 77 N. E. 643.
[2] 1911, Tex. Civ. App. ; 133 S. W. 731.

fense is that the sum sought to be recovered was distributed by the contractor by way of an overpayment to subcontractors to whom he did not owe it, and from whom he received nothing in return for it, and since the mistake which led to such distribution was directly attributable to the plaintiff's erroneous estimates of work done by the subcontractors, it cannot fairly be said, either that the contractor had the benefit of the windfall resulting from the plaintiff's mistake, or that, but for his own fault, he would have had the benefit of it. The enforcement of restitution under the circumstances, it is submitted, was unjust.

Upon principle, there would seem to be room for the argument that proof by the defendant that money received by him from the plaintiff had been expended in purchases which he would not otherwise have made, or that goods received from the plaintiff and consumed by him were luxuries that he would not have purchased, should constitute a defense. For in such a case the defendant's position is so altered that the enforcement of restitution would be a distinct hardship. But, while in *Brisbane* v. *Dacres*[1] and *Skyring* v. *Greenwood*[2] there are intimations to the effect that if, as a result of the receipt of the money sought to be recovered, the defendant " alters the habits of his life," restitution should not be enforced, the point has received very little consideration. It will be more fully discussed in a later section, dealing with the obligation to pay for goods supposed to be a gift (*post*, § 57).

§ 30. (*e*) **Is accidental loss or theft of money or goods a defense?** — The suggestion has been made that the loss by accident or theft of the identical money or thing received by the defendant should be a defense.[3] The case differs from that of a voluntary change of position in that whereas the latter is the direct result of the plaintiff's mistake, the former is so remotely connected with the mistake that it would hardly be called a consequence

[1] 1813, 5 Taunt. 143.

[2] 1825, 4 Barn. & Cr. 281.

[3] Professor Costigan, "Change of Position as a Defense," 20 Harv. Law Rev. 205, 212 n.

or result of it at all. Upon the basis of this difference it may be contended that a loss by accident or theft is the defendant's own calamity; that to deny the plaintiff relief is to shift the defendant's misfortune to the plaintiff's shoulders; and that such a result is as unjust in this case as in that of the accidental destruction of the defendant's building while in process of repair or improvement by the plaintiff (*post*, §§ 116, 117), or that of the misuse by the defendant's agent of funds borrowed without authority and placed to the defendant's credit (*post*, § 75). The argument is not without weight. It is submitted that where the mistake is one for which neither party may fairly be blamed, or one which is due at least as much to the defendant's negligence as to the plaintiff's, the plaintiff should be allowed to recover. But where, on the other hand, the plaintiff is solely or chiefly responsible for the mistake, it may be conceded that the remoteness of his connection with the defendant's loss is so offset by his blamefulness for the mistake as to justify a denial of relief.

§ 31. (*f*) **Laches as a defense.** — Laches, by which is meant such tardiness in asserting a right as makes its enforcement inequitable, bars the enforcement of quasi contractual as well as of other obligations of an equitable nature.[1] But laches should not be confused with change of position. The latter, it is true, is an element in the former, for the defendant is not prejudiced unless some change in his position occurs. But while change of position alone is a defense only when it appears that the defendant was not responsible for the mistake under which the benefit was conferred upon him, or was responsible in no greater degree than the plaintiff, laches is, or should be, a defense even when the mistake was the result of the defendant's negligence alone.

[1] Skyring *v.* Greenwood, 1825, 4 Barn. & Cr. 281; Pooley *v.* Brown, 1862, 11 C. B. N. S. 566; United States *v.* Clinton Nat. Bank, 1886, 28 Fed. 357, (C. C., Ia.); Continental Nat. Bank *v.* Met. Nat. Bank, 1903, 107 Ill. App. 455; Iron City Nat. Bank *v.* Fort Pitt Nat. Bank, 1893, 159 Pa. St. 46; 28 Atl. 195; 23 L. R. A. 615. And see London, etc., Bank *v.* Bank of Liverpool, [1896] 1 Q. B. 7; Bank of St. Albans *v.* Farmers', etc., Bank, 1838, 10 Vt. 141.

§ 32. (VI) **When does cause of action arise? Necessity of demand.** — Inasmuch as the right of one who confers a benefit in misreliance on a right or duty is equitable in character, although enforced in an action at law (*ante*, § 6), it should be held to arise only when the recipient of the benefit is notified or learns that a mistake has been made in consequence of which he ought to make restitution. For to hold one responsible for a failure to restore a benefit received and retained without knowledge of any mistake and without notice of any claim for restitution would be manifestly inequitable.

It follows that where the recipient of the benefit knows, at the time of its receipt, that it is conferred upon him in misreliance upon a right or duty, and that its retention would be unjust, he is under an immediate obligation to make restitution and is not entitled to notice or demand before suit.[1] Likewise, where the recipient, though innocent at the time of the receipt of the benefit, subsequently learns of the mistake, as the result either of his own investigations or of information from a third person, demand is unnecessary.[2] But where the recipient remains in ignorance of the fact that a mistake has been made and that his retention of the benefit is consequently inequitable, he should be notified of the mistake and of the claim for restitution before an action is instituted against him.[3]

[1] Sharkey *v.* Mansfield, 1882, 90 N. Y. 227; 43 Am. Rep. 161, (money paid); Martin *v.* Home Bank, 1899, 160 N. Y. 190; 54 N. E. 717, *aff.* 30 App. Div. 498; 52 N. Y. Supp. 464, (money paid).

[2] See Sheppard *v.* Lang, 1905, 122 Ga. 607; 50 S. E. 371, (money paid); Earle *v.* Bickford, 1863, 6 Allen (Mass.) 549; 83 Am. Dec. 65, (money paid); Bishop *v.* Brown, 1879, 51 Vt. 330, (money paid).

[3] Freeman *v.* Jeffries, 1869, L. R. 4 Exch. 189, (money paid); Worley *v.* Moore, 1881, 77 Ind. 567, 569, (money paid; *cf.* Schultz *v.* Bd. of Commrs., 1883, 95 Ind. 323); Sibley *v.* County of Pine, 1883, 31 Minn. 201; 17 N. W. 337; Gillett *v.* Brewster, 1890, 62 Vt. 312; 20 Atl. 105, (money paid); Stocks *v.* City of Sheboygan, 1877, 42 Wis. 315, (money paid; defendant ought to have known facts). See Sharkey *v.* Mansfield, 1882, 90 N. Y. 227; 43 Am. Rep. 161. In Sharkey *v.* Mansfield, *supra*, FINCH, J., said (p. 229): "Where the mistake is mutual, both parties are innocent, and neither is in the wrong. The party honestly receiving the money through a common mistake owes no duty to return it until at least informed of the error. It is just that he should have an opportunity to correct the mistake, innocently committed on both sides, before

Unfortunately there are a number of cases of money paid under mistake which hold that the cause of action arises upon the receipt of the money, and that even against one who receives and retains it in good faith a demand is unnecessary.[1] But in few of them does the question appear to have been carefully considered.[2] One, at least, is virtually overruled on this point by later decisions in the same jurisdiction.[3] In the most important of them, *Leather Manufacturers' Bank* v. *Mer-*

being subjected to the risks and expenses of a litigation. It was said in *Abbott* v. *Draper* (4 Denio, 53) that 'when a man has paid money as due upon contract to another, and there is no mistake, and no fraud or other wrong on the part of the receiver, there is no principle upon which it can be recovered back until after demand has been made.' While this language is not accurate as to a mistake on the part of the receiver, if that was the meaning intended, the doctrine is clearly recognized that where the receiver is guilty of fraud or other wrong in taking the money, he is not entitled to notice. The necessity of a demand does not, therefore, exist in a case where the party receiving the money, instead of acting innocently and under an honest mistake, knows the whole truth and consciously receives what does not belong to him, taking advantage of the mistake or oversight of the other party, and claiming to hold the money thus obtained as his own. In such case he cannot assume the attitude of bailee or trustee, for he holds the money as his own, and his duty to return it arises at the instant of the wrongful receipt of the overpayment. He is already in the wrong and it needs no request to put him in that position."

In Stotsenburg *v.* Fordice, 1895, 142 Ind. 490, 496; 41 N. E. 313, 810, it was held that where the defendant to an action to recover on a promissory note claimed to set off interest paid by mistake, "the suit of the appellant [plaintiff] excused the demand if one was necessary."

[1] Leather Manfrs.' Bank *v.* Merchants' Bank, 1888, 128 U. S. 26; 9 S. Ct. 3; Rutherford *v.* McIvor, 1852, 21 Ala. 750, 757; Johnson *v.* Saum, 1904, 123 Ia. 145, 148; 98 N. W. 599 (*semble*); Sturgis *v.* Preston, 1883, 134 Mass. 372, 373; Utica Bank *v.* Van Gieson, 1821, 18 Johns. (N. Y.) 485, (but see Southwick *v.* First Nat. Bank, 1881, 84 N. Y. 420, and cases cited in note 1, p. 49).

[2] Professor Keener has shown ("Quasi-Contracts," pp. 144–151) that most of the cases cited in the opinion in Leather Manfrs.' Bank *v.* Merchants' Bank, 1888, 128 U. S. 26; 9 S. Ct. 3, and Sturgis *v.* Preston, 1883, 134 Mass. 372, do not fairly support the conclusion that against an innocent defendant the cause of action arises on the receipt of the benefit.

[3] Although in Utica Bank *v.* Van Gieson, 1821, 18 Johns (N. Y.) 485, it was expressly declared that demand is unnecessary, the opposite view is taken in Southwick *v.* First Nat. Bank, 1881, 84 N. Y. 420, and Sharkey *v.* Mansfield, 1882, 90 N. Y. 227; 43 Am. Rep. 161.

chants' Bank,[1] decided by the United States Supreme Court, the reasoning of the court fairly applies only to cases in which the defendant, by reason of express or implied representations, innocent but false, is held responsible upon the theory of a breach of warranty and not merely as the recipient of a benefit conferred by mistake.[2]

In Vermont it is held that the necessity of a demand depends upon the responsibility for the mistake. If the plaintiff appears to have been at fault, or if neither party is at fault, a demand must be made; but if the responsibility lies with the defendant, though he is unaware that a mistake has been made, demand is unnecessary.[3] This rule, while less objectionable than that which excuses the plaintiff from making a demand under any circumstances, seems hardly fair to the negligent but honest defendant.

§ 33. (VII) **Running of statute of limitations.** — Ordinarily the statute of limitations runs from the day when the cause of action arises. But in cases of money paid or other benefit conferred in misreliance upon a right or duty, it ought in justice to run from the date of the discovery, by the plaintiff,

[1] 1888, 128 U. S. 26; 9 S. Ct. 3.

[2] The case was one of the payment of a check upon a forged indorsement, both the drawee and the holder believing the indorsement to be genuine. In the course of his opinion, Mr. Justice GRAY said (p. 34): "One who, by presenting forged paper to a bank, procures the payment of the amount thereof to him, even if he makes no express warranty, in law represents that the paper is genuine, and, if the payment is made in ignorance of the forgery, is liable to an action by the bank to recover back the money which, in equity and good conscience, has never ceased to be its property. . . . Whenever money is paid upon the representation of the receiver that he has either a certain title in property transferred in consideration of the payment, or a certain authority to receive the money paid, when in fact he has no such title or authority, then, although there be no fraud or intentional misrepresentation on his part, yet there is no consideration for the payment, and the money remains, in equity and good conscience, the property of the payer, and may be recovered back by him, without any previous demand, as money had and received to his use. His right of action accrues, and the statute of limitations begins to run immediately upon the payment."

[3] Varnum *v.* Highgate, 1893, 65 Vt. 416; 26 Atl. 628, (defendant should have known the facts); Turner Falls Lumber Co. *v.* Burns, 1899, 71 Vt. 354; 45 Atl. 896.

of his mistake, or the date when by reasonable diligence he might have discovered it.[1] The California statute so provides,[2] and in Virginia the courts, by emphasizing the analogy to cases of fraud — in which the statute is commonly held to run from the day when the fraud was or ought to have been discovered — have attained the same result.[3] But by the weight of authority, the statute runs from the date of the receipt of the benefit,[4] it being assumed in most of the cases on this point that the cause of action then arises.[5]

§ 34. (VIII) **Recovery of interest.** — The primary obligation in quasi contract is to make restitution in value (*ante*, § 3); hence it may be contended that the purpose and effect of the action of assumpsit, as a quasi contractual remedy, is not the recovery of damages but the enforcement of specific performance. Even so, the obligor should be compelled to answer for damages resulting from his failure to perform his obligation

[1] See Lightwood, "Time Limit on Actions," p. 239; Story, "Equity Jurisprudence" (13th ed.), § 1521a.

[2] California Code of Civil Procedure, § 338; Shain *v.* Sresovich, 1894, 104 Cal. 402; 38 Pac. 51.

[3] Crauford's Admr. *v.* Smith's Extr., 1895, 93 Va. 623; 23 S. E. 235; 25 S. E. 657, (Twenty years after distribution of estate of supposed intestate, his will was discovered. Held: that the statute did not commence to run until the discovery of the will.); Hall *v.* Graham, 1911, 112 Va. 560; 72 S. E. 105.

[4] Leather Manfrs.' Bank *v.* Merchants' Bank, 1888, 128 U. S. 26; 9 S. Ct. 3; Richardson *v.* Bales, 1899, 66 Ark. 452; 51 S. W. 321; Schultz *v.* Board of Comrs., 1883, 95 Ind. 323; City of Indianapolis *v.* Patterson, 1887, 112 Ind. 344; 14 N. E. 551; Jones *v.* School District, 1881, 26 Kan. 490; Sturgis *v.* Preston, 1883, 134 Mass. 372, (but see Walker *v.* Bradley, 1825, 3 Pick. (Mass.) 261); Ely *v.* Norton, 1822, 6 N. J. L. (1 Halst.) 187; Montgomery's Appeal, 1879, 92 Pa. St. 202; 37 Am. Rep. 670, (overpayment by admr. who should have known condition of estate). See Turner *v.* Debell, 1820, 2 A. K. Marsh. (9 Ky.) 383.

[5] In Wyckoff *v.* Curtis, 1894, 7 Misc. R. 444; 27 N. Y. Supp. 1012, however, the court held that since in New York the cause of action does not arise until demand made, the statute commences to run at that time. And in Goodnow *v.* Stryker, 1882, 61 Ia. 261; 16 N. W. 486, which was an action to recover for taxes paid under a mistake as to the ownership of land, it was held that the cause of action did not arise and the statute did not commence to run, until the termination of certain litigation by which the title was adjudged to be in the defendant.

when it ought to be performed. In the case of money paid in misreliance on a right or duty, therefore, interest should be recoverable from the day when the cause of action for restitution arises, as damages for the defendant's failure promptly to perform his obligation. Accordingly, against one who has received and retained money in good faith, interest should be allowed from the date of notice and demand;[1] against one who has received or retained money with knowledge of the payor's mistake, from the date of his receipt of the money, or of his discovery of the mistake.[2] Likewise, where the benefit conferred upon the defendant consists of something other than money — as goods or services, — interest should be recovered on the value of the benefit from the inception of the cause of action. But there is little authority on this point, and the whole subject of the right to recover interest on unliquidated demands is one upon which the law is unsettled.[3]

[1] Georgia R., etc., Co. *v.* Smith, 1889, 83 Ga. 626, 10 S. E. 235, 237; Sibley *v.* County of Pine, 1883, 31 Minn. 201, 204; 17 N. W. 337; Ashurst *v.* Field's Admr., 1877, 28 N. J. Eq. 315; Leach *v.* Vining, 1892, 64 Hun 632; 16 N. Y. Supp. 822; Grim's Estate, 1892, 147 Pa. St. 190; 23 Atl. 802; Simon's Extrs. *v.* Walter's Extrs., 1821, 1 McCord (S. C.) 97, 99; Crauford's Admr. *v.* Smith's Extr., 1895, 93 Va. 623; 23 S. E. 235; 25 S. E. 657; Hall *v.* Graham, 1911, 112 Va. 560; 72 S. E. 105.

[2] *Contra:* Northrop *v.* Graves, 1849, 19 Conn. 548; 50 Am. Dec. 264, in which interest was allowed only from the date of demand. And see Dill *v.* Wareham, 1844, 7 Met. (Mass.) 438; Earle *v.* Bickford, 1863, 6 Allen (Mass.) 549; 83 Am. Dec. 65; Talbot *v.* Nat. Bank of Comm., 1880, 129 Mass. 67; 37 Am. Rep. 302, in which, although a demand was unnecessary to raise an obligation, the plaintiff was allowed interest only from the commencement of the action.

[3] Sedgwick, "Damages," §§ 312–315; Sutherland, "Damages," §§ 347, 348. In Day *v.* New York, etc., R. Co., 1880, 22 Hun (N. Y. Sup. Ct.) 412, it was held that in an action to recover the value of land and a right of way conveyed to the defendant in performance of an oral contract within the Statute of Frauds, which contract the defendant repudiated, the plaintiff was not entitled to interest, even from the date of the commencement of the action. But in Tucker *v.* Grover, 1884, 60 Wis. 240; 19 N. W. 62, where the action was for the value of services rendered and for money paid under a contract within the Statute of Frauds interest was allowed from the commencement of the action.

CHAPTER III

GENERAL PRINCIPLES (*continued*): MISRELIANCE RESULTING FROM MISTAKE OF LAW

§ 35. In general.
§ 36. (I) Reasons for the rule unsound.
§ 37. (II) Encroachments upon the rule:
(1) In two jurisdictions rejected.
§ 38. (2) In England, tendency to reject rule in equity.
§ 39. (3) Statutory modifications.
§ 40. (4) Payments by public officers.
§ 41. (5) Payments to trustees or court officers.
§ 42. (III) What is the true principle?
§ 43. (IV) Mistake of foreign law.
§ 44. (V) Mistake of both law and fact.

§ 35. **In general.** — In the well-known case of *Bilbie* v. *Lumley*,[1] Lord ELLENBOROUGH asked counsel for plaintiff "whether he could state any case where if a party paid money to another voluntarily with a full knowledge of all the facts in the case, he could recover it back again on account of his ignorance of the law?" As a matter of fact there were several such cases in the books,[2] and had they been urged upon the court it is altogether probable that they would have been followed and not improbable that the law would have been accordingly settled for all time. But counsel, though "a most experienced advocate,"[3] is reported to have made no reply, and Lord ELLENBOROUGH, declaring that "Every man must be taken to be cognizant of the law," established the rule that money paid by mistake of law, even under circumstances

[1] 1802, 2 East 469, 470, 472.

[2] Hewer *v.* Bartholomew, 1598, Cro. Eliz. 614; Bonnel *v.* Foulke, 1657, 2 Sid. 4; Turner *v.* Turner, 1679, 2 Chan. Rep. 154; Lansdowne *v.* Lansdowne, 1730, 2 Jac. & Walk. 205; Bize *v.* Dickason, 1786, 1 Term R. 285; and see Keener, "Quasi-Contracts," p. 85, note.

[3] See Brisbane *v.* Dacres, 1813, 5 Taunt. 163.

which make it inequitable for the defendant to retain it, is not recoverable.

The courts of law, while frequently evincing the most profound dissatisfaction with the rule, have followed it with unusual consistency.[1] And even the courts of equity, though

[1] Brisbane *v.* Dacres, 1813, 5 Taunt. 143, (share of freight money paid to admiral of fleet by captain of war vessel in accordance with custom though not required by law); Henderson *v.* Folkstone Waterworks Co., 1885, 1 Times L. R. 329; Elliott *v.* Swartwout, 1836, 10 Pet. (U. S.) 137, 153, (excessive duties paid revenue officer); Town Council of Cahaba *v.* Burnett, 1859, 34 Ala. 400, (liquor license money paid under ordinance subsequently held void); Maryland Casualty Co. *v.* Little Rock, etc., Co., 1909, 92 Ark. 306; 122 S. W. 994, (additional premium paid on class of employees not covered by the terms of the policy); Brumagim *v.* Tillinghast, 1861, 18 Cal. 265; 79 Am. Dec. 176, (money paid for stamps required to be placed on bills of lading by unconstitutional state law); Wingertes *v.* San Francisco, 1901, 134 Cal. 547; 66 Pac. 730; 86 Am. St. Rep. 294, (fees paid by executor to county clerk under unconstitutional statute); Elston *v.* Chicago, 1866, 40 Ill. 514; 89 Am. Dec. 361, (assessments paid for improvements in excess of city's powers); Town of Edinburg *v.* Hackney, 1876, 54 Ind. 83, (liquor license); Coburn *v.* Neal, 1901, 94 Me. 541; 48 Atl. 178, (payment made in ignorance of the negotiable instruments law); Alton *v.* First Nat. Bank, 1892, 157 Mass. 341; 32 N. E. 228; 18 L. R. A. 144; 34 Am. St. Rep. 285, (mistake as to negotiability of instrument); Erkens *v.* Nicolin, 1888, 39 Minn. 461; 40 N. W. 567, (money paid for a quit claim deed to land in ignorance of the rule that distances must yield to natural boundaries called for in the deed); Campbell *v.* Clark, 1891, 44 Mo. App. 249, (money paid on contract for brick wall); Keazer *v.* Colebrook Nat. Bank, 1909, 75 N. H. 278; 73 Atl. 170, (mistake as to law of negotiable instruments); Clarke *v.* Dutcher, 1824, 9 Cow. (N. Y.) 674, (excess rent paid by a tenant "in ignorance of his own rights"); Flynn *v.* Hurd, 1889, 118 N. Y. 19; 22 N. E. 1109, (money paid by commissioner of highways in excess of town's share in repair of bridge); Belloff *v.* Dime Savings Bank, 1907, 118 App. Div. 20; 103 N. Y. Supp. 273; *aff.* 191 N. Y. 551; 85 N. E. 1106, (mistake as to law of wills); Perry *v.* Newcastle, etc., Ins. Co., 1852, 8 U. C. Q. B. (Ont.) 363, (ignorance as to provisions of statute relating to insurance companies); Scott *v.* Ford, 1904, 45 Or. 531; 78 Pac. 742; 80 Pac. 899; 68 L. R. A. 469, (ignorance as to law of wills); Ege *v.* Koontz, 1846, 3 Pa. St. 109, (money paid by garnishee to assignee in bankruptcy of individual creditor); Robinson *v.* Charleston, 1846, 2 Rich. (S. C.) 317; 45 Am. Dec. 739, (void license); Hubbard *v.* Martin, 1835, 8 Yerg. (16 Tenn.) 498, (salary paid by disabled judge to defendant appointed to take his place under an unconstitutional statute); Scott *v.* Slaughter, 1904, 35 Tex. Civ. App. 524; 80 S. W. 643, (money paid for a lease); Mayor, etc., of Richmond *v.* Judah, 1834, 5 Leigh (Va.) 305, (tax paid on mistaken

granting relief from mistakes of law in other cases, have refused to permit the recovery of money paid.[1] It is the threefold purpose of this chapter: first, to show that the reasons for this hard and fast rule of no recovery are unsound; second, to ascertain what, if any, encroachments upon the rule have been established; and third, by means of an examination of the different and unfortunately conflicting theories upon which equity has granted relief from mistakes of law in other cases, to determine upon the principle which, with proper regard for justice and sound policy, ought to be applied. Mistake of foreign law, and mistake of both fact and law, will also be briefly considered.

construction of municipal ordinance); Gage *v.* Allen, 1894, 89 Wis. 98; 61 N. W. 361, (money paid by assignee of insolvent to a creditor not entitled to receive it but thinking he was obliged to do so because of a judgment). And see Heath & Milligan Mfg. Co. *v.* Nat. Linseed Oil Co., 1901, 99 Ill. App. 90; *aff.* 1902, 197 Ill. 632; 64 N. E. 732, (payments made for oil at 7.50 lbs. per gal. when statutory gal. weighed 7.761); Bond *v.* Coats, 1861, 16 Ind. 202, (promise to pay an unenforceable claim, made under mistake as to legal obligation, enforced). *Cf.* Rawson *v.* Bethesda Baptist Church, 1905, 123 Ill. App. 239; *aff.* 1906, 221 Ill. 216; 77 N. E. 560; 6 L. R. A. (N. S.) 448. *Contra:* Mansfield *v.* Lynch, 1890, 59 Conn. 320; 22 Atl. 313; 12 L. R. A. 285, (mistake as to administrative law); Culbreath *v.* Culbreath, 1849, 7 Ga. 64; 50 Am. Dec. 375, (mistake as to law of distribution of estates); Scott *v.* Board of Trustees, 1909, 132 Ky. 616; 116 S. W. 788; 21 L. R. A. (N. S.) 112, (liquor license); Lawrence *v.* Beaubien, 1831, 2 Bailey (S. C.) 623; 23 Am. Dec. 155, (mistake as to rights in land). See also cases *post*, § 37.

It is a curious fact that the rule appears to be confined to cases of money paid, although cases of services rendered or goods delivered under mistake of law are in principle undistinguishable.

[1] Clifton *v.* Cockburn, 1834, 3 Myl. & K. 76, (misconstruction of marriage settlement); Hemphill *v.* Moody, 1879, 64 Ala. 468, (but court here allowing amount paid by mistake to be set off against claims of heirs of payee); Tiffany & Co. *v.* Johnson & Robinson, 1854, 5 Cush. (27 Miss.) 227, 232, (payment by sheriff to subsequent execution creditor); Knickerbocker Trust Co. *v.* Oneonta, etc., R. Co., 1910, 138 App. Div. 687; 123 N. Y. Supp. 822, (money advanced on receiver's certificates issued under order of court reversed on appeal); Stewart *v.* Ferguson, 1899, 31 Ont. 112, 115, (excessive payments of interest after maturity of mortgage); Beard *v.* Beard, 1885, 25 W. Va. 486; 52 Am. Rep. 219, (money voluntarily paid after decree of reference not settling liability). And see Powell *v.* Bunger, 1881, 79 Ind. 468, 471, (injunction against collection, by execution, of costs voluntarily paid by defendant).

§ 36. (I) **Reasons for the rule unsound.** — The reason almost invariably assigned for the rule is that given by Lord ELLENBOROUGH in the leading case: "Every man must be taken to be cognizant of the law." This appears to be generally regarded (as it appears to have been regarded by Lord ELLENBOROUGH) as nothing more than a free translation of the maxim, *Ignorantia juris non excusat.* But this maxim clearly implies a charge of delinquency — the commission of a crime, the breach of a contract, or the commission of a tort, "and therefore assumes the existence of a defendant seeking to justify an act, in the doing of which it is claimed he has violated some right": [1]

Lansdown v. *Lansdown*, 1730, Mosely 364: KING, Ld. Ch. (p. 365): "That maxim of law, *Ignorantia juris non excusat*, was in regard to the public, that ignorance cannot be pleaded in excuse of crimes, but did not hold in civil cases."

Queen v. *Mayor of Tewkesbury*, 1868, L. R. 3 Q. B. 629: BLACKBURN, J. (p. 635): "The rule is that ignorance of the law shall not excuse a man, or relieve him from the consequences of a crime, or from liability on contract."

Culbreath v. *Culbreath*, 1849, 7 Ga. 64; 50 Am. Dec. 375: NISBET, J. (p. 71): "The idea of *excuse*, implies delinquency. No man can be excused upon a plea of ignorance of the law, for disobeying its injunctions, or violating its provisions, or abiding his just contracts. He is presumed to know the law, and if he does not know it, he is equally presumed to be delinquent. I remark, to avoid misconstruction, that it is of universal application in criminal cases. In civil matters, it ought not to be used to effectuate a wrong."

The maxim has no proper application, either in law or in policy, to the case of one who has done no wrong and who seeks not to inflict a loss upon another, but to save himself from a loss.

Its identity with the recognized maxim *Ignorantia juris non excusat* being disproved, the proposition that a man is presumed to know the law is found to be of decidedly questionable character. Said Lord MANSFIELD,[2] "as to the certainty of

[1] Keener, "Quasi-Contracts," p. 90.
[2] Jones *v.* Randall, 1774, Cowp. 37, 40.

the law . . . it would be very hard upon the profession, if the law was so certain, that everybody knew it." Said Chief Justice ABBOTT,[1] "God forbid that it should be imagined that an attorney, or a counsel, or even a judge is bound to know all the law." Said Justice MAULE,[2] "There is no presumption in this country that every person knows the law: it would be contrary to common sense." And there are not a few cases in the books in which ignorance of the law has been permitted to be proved.[3]

It has been contended also that to permit a recovery would lead to the greatest uncertainty as to one's rights. "There is no saying to what extent the excuse of ignorance might not be carried."[4] But the courts both in England and America have long conceded that money paid under mistake of *fact*, in circumstances which make its retention inequitable, may be recovered; and there appears to be no reason to fear that the excuse of ignorance of law would prove a greater temptation to the unscrupulous or a more effective weapon of injustice. Moreover, in the few jurisdictions which have made the experiment of permitting a recovery in case of mistake of law, there

[1] Montriou *v.* Jefferys, 1825, 2 Car. & P. 113, 116.

[2] Martindale *v.* Falkner, 1846, 2. C. B. 706, 719.

[3] Lansdown *v.* Lansdown, 1730, Mosely 364, (equity ordered the surrender of a bond given by the plaintiff to secure defendant's father in quiet enjoyment under a mistake as to the law of inheritance); Rex *v.* Hall, 1828, 3 Car. & P. 409, (indictment for robbery; defendant allowed to show he thought property taken his own); Queen *v.* Mayor, etc., of Tewkesbury, 1868, L. R. 3 Q. B. 629, 635, (voters knew B., one of the candidates for town council, was mayor, but were allowed to show ignorance that he was thereby disqualified as candidate); Regina *v.* Twose, 1879, 14 Cox Cr. Cas. 327, (defendant set fire to furze on common, thinking she did it of right). And see Commonwealth *v.* Stebbins, 1857, 8 Gray (Mass.) 492, (larceny); State *v.* Pullen, 1901, 3 Pennewill (Del.) 184, 50 Atl. 538, (larceny); Triplett *v.* Commonwealth, 1906, 122 Ky. 35; 28 Ky. Law Rep. 974; 91 S. W. 281, (robbery).

[4] Lord ELLENBOROUGH in Bilbie *v.* Lumley, 1802, 2 East 469, 472. See also opinion by MITCHELL, J., in Erkins *v.* Nicolin, 1888, 39 Minn. 461; 40 N. W. 567, and Pomeroy on "Equity Jurisprudence," Vol. 2, § 842, where it is said that "If ignorance of the law were generally allowed to be pleaded, there could be no security in legal rights, no certainty in judicial investigations, no finality in litigations."

appears to be no abuse of the right nor dissatisfaction with the working of the rule.

Assuming then that it is not true that one is presumed to know the law, and further assuming that the danger of the abuse of the right is not a grave one, is there any other ground, any reason in justice or public policy, which justifies the rule of no recovery? It is believed that there is not. On the contrary, it is believed that to permit a recovery, with limitations the same or similar to those with which the right to recover in cases of mistake of fact is hedged about, would sensibly diminish the area of human rights at present beyond the reach of the law.

§ 37. (II) **Encroachments upon the rule**: (1) **In two jurisdictions rejected.** — In at least two American jurisdictions — Connecticut and Kentucky — the alleged distinction between mistake of fact and mistake of law has been consistently denied. In the most frequently cited and quoted Connecticut case, *Northrop's Executors* v. *Graves*,[1] Chief Justice CHURCH, in an admirably clear, trenchant opinion, said: "The mind no more assents to the payment made under a mistake of the law, than if made under a mistake of the facts; the delusion is the same in both cases; in both alike, the mind is influenced by false motives." In Kentucky the question has been presented in a variety of cases. Perhaps one of the most interesting is *McMurtry* v. *Kentucky Central Railroad Company*.[2] The railroad company, having paid a judgment in an action for personal injuries, with interest from the date of its rendition, brought suit to recover the amount paid as interest on the ground that it had been paid under a mistake, the statute providing that judgments for personal injuries, *inter alia*, should not bear interest. In giving judgment for the plaintiff, the court emphasized the fact that there had been no compromise or choice

[1] 1849, 19 Conn. 548, 554; 50 Am. Dec. 234. *Accord:* Kane *v.* Morehouse, 1878, 46 Conn. 300; Mansfield *v.* Lynch, 1890, 59 Conn. 320; 22 Atl. 313; 12 L. R. A. 285; Monroe Nat. Bank *v.* Catlin, 1909, 82 Conn. 227; 73 Atl. 3.

[2] 1886, 84 Ky. 462, 464; 1 S. W. 815.

of courses by the company in making the payment. "When the parties," said Justice HOLT, "regard a question of either law or fact as doubtful, and to avoid litigation, and by way of compromise, payment is made, then no recovery can be had; but in the case now before us no question was raised at the time as to the right of the claimant to interest." In other cases in the same jurisdiction recovery has been permitted of meter rent paid by a consumer to a gas company, which, under a proper construction of the contract between the gas company and the city, the company had no right to charge;[1] of a liquor license fee paid under an invalid ordinance;[2] of premiums paid on a void insurance policy;[3] of money paid under an unconstitutional statute;[4] of money paid by a married woman in ignorance of her rights under a statute;[5] of taxes illegally assessed under a mistake of law.[6] As to taxes, however, it should be noted that it has been held[7] that when payment can be coerced only by suit, then if payment is made without suit no recovery will be allowed. This seems entirely to disregard the question of mistake, and erroneously to assume that the only possible ground of recovery is that of payment under compulsion.

§ 38. (2) **In England, tendency to reject rule in equity.** — In England there is a tendency, in equity cases, to disregard the arbitrary and unjust distinction between the recovery of money paid under mistake of law and relief from such mis-

[1] Capital Gas Co. *v.* Gaines, 1899, 20 Ky. Law Rep. 1464; 49 S. W. 462.

[2] Bruner *v.* Stanton, 1897, 102 Ky. 459; 43 S. W. 411; Scott *v.* Board of Trustees, 1909, 132 Ky. 616; 116 S. W. 788; 21 L. R. A. (N. S.) 112.

[3] Metropolitan Life Ins. Co. *v.* Blesch, 1900, 22 Ky. Law Rep. 530; 58 S. W. 436.

[4] Board of Trustees *v.* Board of Education, 1903, 25 Ky. Law Rep. 341; 75 S. W. 225.

[5] Kentucky, etc., Trust Co. *v.* Langan, 1911, 144 Ky. 46; 137 S. W. 846.

[6] City of Louisville *v.* Henning, 1866, 1 Bush (64 Ky.) 381.

[7] Louisville, etc., R. Co. *v.* Commonwealth, 1890, 89 Ky. 531; 12 S. W. 1064. See also Brands *v.* Louisville, 1901, 111 Ky. 56; 63 S. W. 2, (illegal assessment for street repairs).

takes in other cases. In *Rogers* v. *Ingham*,[1] which has been referred to as "the modern leading case," it appeared that an executor, acting on the advice of counsel in the construction of a will, proposed to divide a fund in certain proportions between two legatees. One of the legatees, being dissatisfied, took the advice of counsel, which agreed with the former opinion. The executor then divided and paid over the fund, and two years later the dissatisfied legatee filed this bill against the executor and the other legatee, alleging a mistake in construing the will and claiming repayment from the other legatee. The prayer of the bill was denied, but the court appears to have based the decision, not on the ground that there could be no recovery of money paid under mistake of law, but on the ground that complainant having, after deliberation and advice, chosen one of two courses open to him, could not repudiate his election. And Lord Justice MELLISH significantly said:

"I think that, no doubt, as was said by Lord Justice *Turner*, 'This Court has power (as I feel no doubt that it has) to relieve against mistakes in law as well as against mistakes in fact';[2] that is to say, if there is any equitable ground which makes it, under the particular facts of the case, inequitable that the party who received the money should retain it."

In *Daniell* v. *Sinclair*,[3] a mortgage account had been settled on the footing of compound interest, both parties erroneously supposing that compound interest was legally collectible, and though the court conceded that giving credit in an account was in many respects equivalent to payment, it held that the account might be reopened. "In equity," said the court, "the line between mistakes in law and mistakes in fact has not been so clearly and sharply drawn."[4]

[1] 1876, 3 Ch. Div. 351, 357.

[2] Stone v. Godfrey, 1854, 5 De G. M. & G. 90.

[3] 1881, 6 App. Cas. 181, 190.

[4] See also *In re* Hulkes, 1886, 33 Ch. D. 552; Allcard *v.* Walker, [1896] 2 Ch. 369, 381. In the latter case, STIRLING, J., speaking of the power of equity to relieve against mistakes of law, said: "No doubt the jurisdiction is one to be carefully exercised and the facts in each case

§ 39. (3) **Statutory modifications.** — In at least six jurisdictions — California, Montana, North Dakota, South Dakota, Oklahoma, and Georgia — the rule has been modified by legislative enactment. In the first five, the statute, after providing that apparent consent is not free when obtained through mistake and that mistake may be either of fact or of law, defines the latter as " (1) A misapprehension of the law by all parties, all supposing that they knew and understood it, and all making substantially the same mistake as to the law; or (2) a misapprehension of the law by one party, of which the others are aware at the time of contracting, but which they do not rectify."[1]

The mistake defined in the second clause contains an element of fraud which affords a separate and obvious ground for relief. But the definition in the first clause is of a mistake in the true sense, and is remarkable in that by its terms relief is confined to cases in which the mistake is common to all parties. This is a distinction which, as will presently appear, has found some favor elsewhere. Its merits will be briefly discussed on a later page (*post*, § 42). At this point it is only necessary to note that while the statute does not expressly extend to cases of an action at law to recover money paid, or other benefits conferred, the exception of such cases has not been recognized. Thus, in *Gregory* v. *Clabrough's Executors*,[2] it was held that the proceeds of the crop upon mortgaged premises, paid by the mortgagor to the mortgagee on the advice of an attorney that the mortgagee was entitled thereto because the mortgage covered " rents, issues, and profits," might be recovered as money paid under mistake of law common to all parties within the provisions of the code.

must be closely scrutinized to see which way the equity lies." It has been contended by Mr. Corry Montague Stadden ("Error of Law," 7 Columbia Law Rev. 476) that at the present day in England, as well as in France and Germany, there is no difference between mistake of law and mistake of fact. But see Henderson *v.* Folkstone Waterworks Co., 1885, 1 Times L. R. 329.

[1] California Civil Code, § 1578; North Dakota Revised Codes, 1905, § 5299; South Dakota Civil Code, § 1207; Oklahoma Compiled Laws, 1909, § 1058; Montana Civil Code, § 2123.

[2] 1900, 129 Cal. 475; 62 Pac. 72.

In Georgia, before the adoption of the statute, it had been held that money paid under a *mistake* of law, as distinguished from *ignorance* of the law, might be recovered, the court in one case [1] defining the distinction as follows: "*Ignorance* implies passivity; *mistake* imputes action. *Ignorance* does not pretend to knowledge, but *mistake* assumes to know. *Ignorance* may be the result of laches, which is criminal; *mistake* argues diligence, which is commendable." The statute appears to recognize this distinction, for it provides that "mere ignorance of the law" will not authorize the intervention of equity.[2] And in the following section a further limitation of the jurisdiction appears to be raised by the provision defining the mistakes which are relievable as mistakes of law "as to the effect of an instrument on the part of both contracting parties." [3] Does this mean that unless the mistake of law be (1) as to the effect of an instrument, and (2) common to all parties, relief will not be granted? If so, the old rule of no recovery is but slightly relaxed.

§ 40. (4) **Payments by public officers.** — It has frequently been decided that the rule of no recovery does not extend to the case of the payment of money by public officers or public agents.[4] The reason generally offered for this limitation is

[1] Culbreath *v.* Culbreath, 1849, 7 Ga. 64, 70; 50 Am. Dec. 375. See also Lawrence *v.* Beaubien, 1831, 2 Bailey (S. C.) 623; 23 Am. Dec. 155.

[2] Georgia Code, § 3978. See Arnold & DuBose *v.* Georgia, etc., Co., 1873, 50 Ga. 304.

[3] Georgia Code, § 3979.

[4] Wisconsin, etc., R. Co. *v.* United States, 1896, 164 U. S. 190; 17 S. Ct. 45 (*cf.* Badeau *v.* United States, 1888, 130 U. S. 439; 9 S. Ct. 579); Barnes *v.* Dist. of Col., 1887, 22 Ct. Cl. 366; Ada County *v.* Gess, 1895, 4 Idaho 611; 43 Pac. 71; Board of Com'rs *v.* Heaston, 1895, 144 Ind. 583; 41 N. E. 457; 43 N. E. 651; 55 Am. St. Rep. 192; Heath *v.* Albrook, 1904, 123 Ia. 559; 98 N. W. 619; State *v.* Young, 1907, 134 Ia. 505; 110 N. W. 292; Board of Com'rs *v.* Patrick, 1874, 12 Kan. 605; Ellis *v.* Board of Auditors, 1895, 107 Mich. 528; 65 N. W. 577; Board of Supervisors *v.* Ellis, 1875, 59 N. Y. 620; Alleghany County *v.* Grier, 1897, 179 Pa. St. 639; 36 Atl. 353; Commonwealth *v.* Field, 1887, 84 Va. 26; 3 S. E. 882; Douglas County *v.* Sommer, 1904, 120 Wis. 424; 98 N. W. 249. See also Kerr *v.* Regester, 1908, 42 Ind. App. 375; 85 N. E. 790, (action by a taxpayer). *Contra:* Jefferson

the importance of protecting the public funds and the interests of the community. But in some of the cases, where the *defendant* also is a public officer or agent, stress is laid upon the fiduciary relation existing between the parties, or between the plaintiff's principal and the defendant.[1] As it was put in the case of *Alleghany County* v. *Grier:*[2] "Fidelity to the government, which he represents and is sworn to support, makes restitution a duty."

§ 41. (5) **Payments to trustees or court officers.** — Some of the courts have evinced their belief in the injustice and dishonesty of the rule of no recovery by refusing to extend it to cases of payments to trustees or other officers of the court.[3] Said Lord Justice JAMES in the prominent case of *Ex parte James:*[4]

"I think that the principle that money paid under a mistake of law cannot be recovered must not be pressed too far, and there are several cases in which the Court of Chancery has held itself not bound strictly by it. I am of the opinion that a trustee in bankruptcy is an officer of the Court. He has inquisitorial powers given him by the Court, and the Court regards him as its officer, and he is to hold money in his hands upon trust for its equitable distribution among the creditors. The

County *v.* Hawkins, 1887, 23 Fla. 223; 2 So. 362, 365; People *v.* Foster, 1890, 133 Ill. 496; 23 N. E. 615 (*cf.* Moffett *v.* People, 1907, 134 Ill. App. 550); Painter *v.* Polk County, 1890, 81 Ia. 242; 47 N. W. 65; 25 Am. St. Rep. 489; Wayne County *v.* Randall, 1880, 43 Mich. 137; 5 N. W. 75; State *v.* Ewing, 1893, 116 Mo. 129; 22 S. W. 476; Territory *v.* Newhall, 1909, 15 N. M. 141; 103 Pac. 982. See also Morgan Park *v.* Knopf, 1902, 199 Ill. 444; 65 N. E. 322; Board of Highway Commrs. *v.* City of Bloomington, 1912, 253 Ill. 164; 97 N. E. 280.

[1] Ellis *v.* Board of Auditors, 1895, 107 Mich. 528; 65 N. W. 577; United States *v.* Bartlett, 1839, 2 Ware (Dav. 9) 17; Fed. Cas. No. 14,532.

[2] 1897, 179 Pa. St., 639, 642; 36 Atl. 353.

[3] *Ex parte* James, 1874, L. R. 9 Ch. 609; *Ex parte* Simmonds, 1885, 16 Q. B. D. 308; Carpenter *v.* Southworth, 1908, 165 Fed. 428; 91 C. C. A. 378; Moulton *v.* Bennett, 1836, 18 Wend. (N. Y.) 586; Gillig *v.* Grant, 1897, 23 App. Div. 596; 49 N. Y. Supp. 78; Comm. *v.* Lancaster County Ins. Co., 1891, 6 Pa. Dist. 371. See, *contra*, Wilde *v.* Baker, 1867, 14 Allen (Mass.) 349.

[4] 1874, L. R. 9 Ch. 609, 614.

Court, then, finding that he has in his hands money which in equity belongs to some one else, ought to set an example to the world by paying it to the person really entitled to it. In my opinion the Court of Bankruptcy ought to be as honest as other people."

This exception to the rule has been held in a few cases to extend to payments to attorneys at law, either by their clients or by others. For example, in the New York case of *Moulton* v. *Bennett*,[1] where it appeared that the defendant in a litigation had paid to the plaintiff's attorney costs which were not legally chargeable, it was held that the money might be recovered.

§ 42. (III) **What is the true principle?** — As was pointed out at the beginning of this chapter (*ante*, § 35) the courts of equity, while generally refusing to enforce the repayment of money paid under mistake of law, have frequently granted relief from mistakes of law in other cases. But they are by no means agreed as to the jurisdictional test. It is now proposed to examine some of the theories that have been advanced, with a view to the selection of the true test — the test which ought in principle to be applied to cases of actions to recover money paid as well as to all other cases.

(1) *That relief should be granted from mistake of one's "private rights," but not from mistake of general law.*

In the prominent case of *Cooper* v. *Phibbs*,[2] Lord WESTBURY, "one of the ablest judges that ever sat in the English court of chancery,"[3] said:

"It is said, '*Ignorantia juris haud excusat*'; but in that maxim the word '*jus*' is used in the sense of denoting general law, the ordinary law of the country. But when the word '*jus*' is used in the sense of denoting a private right, that maxim has no application. Private right of ownership is a matter of fact; it may be the result also of matter of law; but if the parties contract under a mutual mistake and misapprehension

[1] 1836, 18 Wend. (N. Y.) 586.
[2] 1867, L. R. 2 H. L. 149, 170.
[3] Pomeroy, "Equity Jurisprudence," § 842, note.

as to their relative and respective rights, the result is, that that agreement is likely to be set aside as having proceeded upon a common mistake."

There has been a considerable inclination in courts of equity, particularly in England, to follow this distinction. Just what mistakes Lord WESTBURY meant to exempt from the operation of the maxim, however, is not clear. The best interpretation of his doctrine, perhaps, is that offered by Mr. Justice HOLMES, in *Alton* v. *First National Bank:* [1]

"Lord Westbury sometimes is supposed to have taken a distinction as to the effect of a mistake of law according to whether the mistaken principle is general or special. But in the often quoted passage of his judgment he only meant that certain words, such as ownership, marriage, settlement, etc., import both a conclusion of law and facts justifying it, so that, when asserted without explanation of what the facts relied on are, they assert the existence of facts sufficient to justify the conclusion, and a mistake induced by such an assertion is a mistake of fact. In the case before him the mistake was one concerning the ownership of a fishery, and was induced by a general statement of a certain person that he owned it."

Thus interpreted, the statement constitutes a very slight qualification of the general rule of no relief for mistakes of law, if indeed it can be said to qualify the rule at all.

(2) *That relief should be granted for mistake of law common to all parties — that is to say, where they all act under the same misapprehension of law.*

This modification of the rule of no relief, as has been seen (*ante*, § 39), has the sanction of legislative enactment in several states. But it has been justly condemned.[2] As a ground for the reformation of a contract, the necessity that the mistake shall be common to both parties is intelligible; but in other cases the reason for such a requirement is not apparent.

[1] 1892, 157 Mass. 341, 343; 32 N. E. 228; 18 L. R. A. 144; 34 Am. St. Rep. 285.

[2] Pomeroy, "Equity Jurisprudence," § 846.

(3) *That relief should be granted from mistakes of law made in reducing to writing a contract already agreed upon by the parties, the result being that the language of the writing has a meaning or effect in law different from the intention, as distinguished from a mistake with regard to the legal meaning or effect of a written instrument agreed upon as representing the contract between the parties.*

This theory is a very popular one with both text writers and judges,[1] and is invariably sought to be supported with the argument that in the first-mentioned case there is no mistake as to the legal import of the *contract actually made*, but the mistake of law prevents the real contract from being embodied in the written instrument. The distinction, however, has been thought by careful students to be unsound. The strongest and clearest indictment of it, perhaps, is that of Mr. Bigelow, who says:[2]

"The writing is agreed upon as stating the contract in the one case as much as in the other. It matters not whether the parties say 'Here are the facts, and here is what on deliberation we want to do,' and then accept from the draftsman the written instrument and execute it as embodying their intention; or 'This writing on consideration we accept as truly expressing our intention and fix our signatures to it accordingly.' The second act may imply more deliberation concerning the writing; but in neither case may the deliberation have touched the legal difficulty which finally arises. . . . The distinction is trifling; it does not go to the root of the matter."

(4) *That relief should be granted from mistake as to a clear and established rule of law, as distinguished from mistake as to a doubtful and unsettled rule.*[3]

Thus stated, this modification certainly cannot be supported. In the first place, it amounts to saying that the better known

[1] Pomeroy, "Equity Jurisprudence," § 843, and cases cited. Story, "Equity Jurisprudence" (13th ed.) § 114, and cases cited.

[2] Note to Story, "Equity Jurisprudence" (13th ed.) § 110; also 1 Law Quart. Rev. 303.

[3] Story, "Equity Jurisprudence" (13th ed.) § 121, and cases cited.

is a rule of law the less responsible is one for failing to know it. And in the second place, it seems certain that it would often be difficult to decide whether a given rule of law were clear and established or doubtful and unsettled, and that the varying conclusions of different courts would lead to embarassment and confusion. An examination of the earlier cases in which the rule is stated, however, shows the probability that the intention was to distinguish *unconscious* from *conscious* ignorance of the law. Thus, in *Naylor* v. *Winch*,[1] Vice Chancellor Sir JOHN LEACH said:

"If a party acting in ignorance of a plain and settled principle of law, is induced to give up a portion of his indisputable property to another under the name of compromise, a court of equity will relieve him from the effect of his mistake. But where a doubtful question arises, such as this question of construction upon the will of the testator, it is extremely reasonable that parties should terminate their differences by dividing the stake between them, in the proportions which may be agreed upon."

In other words, the distinction is between a genuine *compromise*, the parties knowing that they may be surrendering legal rights, and a settlement made "under the name of a compromise" but really in total and unconscious ignorance that any possible legal right is yielded. Stated in this way, the rule, as far as it goes, is perfectly sound, and is applicable alike to mistake of law and mistake of fact.[2] Moreover, it obviously suggests the further-reaching modification next to be considered.

(5) *That relief should be granted, unless at the time of the act there was present to the mind of the actor a doubt as to the law.*

To put the distinction in another way, if one is conscious of a doubt as to his legal rights or duties, and with or without

[1] 1824, 1 Sim. & Stu. 555, 564.

[2] Mr. Pomeroy escapes Sir JOHN LEACH's conclusion by insisting that he referred to family compromises only — such being governed admittedly by different considerations.

deliberation, with or without advice, chooses and enters upon a course of action, he should not be permitted to repudiate his choice; but if one conceives and enters upon a course of action in unconscious ignorance of any question as to his legal rights or duties, relief should be granted.

This theory is most ably supported by Mr. Bigelow,[1] who contends that it is the true doctrine of the leading case of *Hunt* v. *Rousmanier*,[2] except that there it appears that in order to bar relief the choice must have been *deliberately* made. To quote Mr. Justice WASHINGTON:[3]

"We mean to say, that where the parties, upon deliberation and advice, reject one species of security, and agree to select another, under a misapprehension of the law as to the nature of the security so selected, a court of equity will not, on the ground of such misapprehension, and the insufficiency of such security, . . . direct a new security."

The notion that *deliberation* is essential to the denial of relief has appeared in other cases. For example, in *Rogers* v. *Ingham*,[4] Lord Justice JAMES said:

"Where people have a knowledge of all the facts, and take advice, and whether they get proper advice or not, the money is divided and the business is settled, it is not for the good of mankind that it should be reopened."

But the test of *choice* — with or without deliberation — seems to be the more scientific one, and while, as has sufficiently appeared, the authorities on the subject are in the utmost confusion, there is no doubt that a large number of cases may be brought into line with it.[5] Moreover, it is a test which is supported by the cases of money paid under mistake of *fact*. For while it is there generally held that negligence in not know-

[1] Story, "Equity Jurisprudence" (13th ed.) § 110, note on mistake of law; also 1 Law Quart. Rev. 303.

[2] 1823, 8 Wheat. (U. S.) 174; 1828, 1 Pet. (U. S.) 1.

[3] 1 Pet. (U. S.) 17.

[4] 1876, 3 Ch. D. 351, 357.

[5] See Bigelow's note to Story, "Equity Jurisprudence" (13th ed.) § 110.

ing the fact is not a bar to recovery (*ante*, § 15), an examination of the cases will show that in most if not all of them the negligence referred to is an unconscious negligence — that is to say, the plaintiff, at the time of payment, entertained no doubt as to the facts. And, conversely, it is held that when the fact is disputed or acknowledged to be in doubt, a payment once made cannot be recovered (*ante*, § 17).

It is submitted, then, that this test of the jurisdiction to relieve from mistake is the true one, and that it would prove as satisfactory in cases of mistake of law as it has already proved in cases of mistake of fact. And it is respectfully urged upon our courts and legislatures that without abrogating the present rule denying recovery of money paid under mistake of law, but by confining its application to cases in which the money appears to have been paid with the consciousness of a doubt as to the law, the hardship of the rule will be minimized if not entirely eliminated, and the whole law of relief from mistake placed upon a basis of sound and consistent policy.

§ 43. (IV) **Mistake of foreign law.** — As a result of the rule that even the courts of one State are not presumed to know the laws of other States and cannot take cognizance of them until legally proved, money paid by a citizen of one State under a mistake as to the law of a foreign State or of another of the United States is regarded as paid under a mistake of fact and therefore may be recovered:

Haven v. *Foster*, 1829, 9 Pick. (Mass.) 112; 19 Am. Dec. 353: Mistake by residents of Massachusetts as to New York law of descent. MORTON, J. (p. 130): "The parties knew, in fact, that the intestate died seised of estate situated in the State of New York. They must be presumed to know that the distribution of that estate must be governed by the laws of New York. But are they bound, on their peril, to know what the provisions of these laws are? If the judicial tribunals are not presumed to know, why should private citizens be? If they are to be made known to the court by proof, like other facts, why should not ignorance of them by private individuals have the same effect upon their acts as ignorance of other facts?

Juris ignorantia est, cum jus nostram ignoramus, and does not extend to foreign laws or the statutes of other states."

Vinal v. *Continental Const., etc., Co.*, 1889, 53 Hun (N. Y. Sup. Ct.) 247; 6 N. Y. Supp. 595: Mistake by nonresident as to validity of proceedings consolidating New York corporations. LEARNED, P. J. (p. 252): "Foreign laws (including laws of other states) are facts. The presumption that every one knows the laws of his own state is hard enough. He never is presumed to know the laws of all the other states in this country, and the laws of all the nations of the world." [1]

Presumably, however, relief would not be granted in case the law of the foreign State were the same as that of the plaintiff's domicile.

§ 44. (V) **Mistake of both fact and law.** — Where one's misreliance upon a supposed duty is the result of two mistakes, one of fact and one of law, he is not entitled to relief in jurisdictions where money paid under mistake of law cannot be recovered:

Needles v. *Burk*, 1884, 81 Mo. 569; 51 Am. Rep. 251: Action to recover the value of certain property delivered to the defendant in satisfaction of a supposed liability for the alleged act of the plaintiff's infant son in negligently setting fire to the

[1] Bank of Chillicothe *v.* Dodge, 1850, 8 Barb. (N. Y. Sup. Ct.) 233, (mistake by Ohio bank as to the New York statute governing issue of commercial paper). See Norton *v.* Marden, 1838, 15 Me. 45; 32 Am. Dec. 132; Ætna Ins. Co. *v.* Mayor, 1896, 7 App. Div. 145; 40 N. Y. Supp. 120, 124, (mistake by non-resident as to legality of New York tax assessment).

Professor Keener suggests that a plaintiff who seeks to recover money paid under a mistake as to the law of the jurisdiction where the action is brought would not be allowed to recover if, though a resident of another jurisdiction, he paid the money in the jurisdiction as to the law of which he was mistaken. "Surely," he says ("Quasi-Contracts," p 94), "a court would not be justified in saying that a non-resident is entitled to relief, though making a mistake as to the law of the jurisdiction where the money was paid, while in that jurisdiction, when a resident making a similar mistake would have no right to recover." But on the other hand, would a court be justified in saying that since the residents of a particular state are presumed to know the law of that state a foreigner who happens to be in the state temporarily must also be presumed to know its law?

defendant's barn. HOUGH, C. J. (p. 572): "It is settled in this state that a father is not responsible for injuries inflicted through the negligence or willful wrong of his minor child. The plaintiff, therefore, was not liable to the defendant, Burk, for the value of his barn, even though it had been set on fire by the plaintiff's son. If the plaintiff's son had fired the barn, and in consequence thereof, but in ignorance of the fact that he was not legally liable therefor, the plaintiff had paid the defendant the amount of his loss, it would not be pretended that he could recover it back."

If, however, the misreliance upon a supposed duty is the result of a mistake of fact alone, the circumstance that the plaintiff also labored under a mistake of law which affected the *policy* of performing the supposed duty should not prevent a recovery (see *ante*, § 18). For example, if by the law of Missouri, a father *were* responsible in damages for the torts of his minor child, and the plaintiff in the foregoing case had paid under a mistake as to the fact of the commission of the tort and also under a mistaken belief that he was criminally responsible for his son's act, he would have been entitled to a recovery. For the only mistake as to his legal duty to pay would have been a mistake of fact; the mistake of law would have affected merely the policy of making the payment.

CHAPTER IV

MISRELIANCE ON NON-EXISTENT OR INVALID CONTRACT

§ 45. In general.
§ 46. (I) Misreliance on contract: Gifts and gratuitous services distinguished.
§ 47. Same: Peculiar doctrine of a few cases.
§ 48. Same: Disappointed expectations.
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§ 50. Same: Burden of proof.
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§ 52. (II) Sundry instances of the obligation, classified according to nature of defect in contract:
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§ 56. (*a*) When defendant knows that compensation is expected — *Boston Ice Co.* v. *Potter.*
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§ 58. (*c*) *Concord Coal Co.* v. *Ferrin*, and *Boulton* v. *Jones.*
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§ 64. (C) Promise indefinite.
§ 65. Same: Engagements of honor distinguished.
§ 66. (D) Required form wanting.
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§ 68. (1) Married women.
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§ 71. (4) Corporations.
§ 72. (F) Authority of agent wanting.
§ 73. Same: Instrument under seal.
§ 74. Same: Agent's abortive execution of instrument under seal.
§ 75. Same: Receipt of benefit by principal.
§ 76. Same: Misuse of money by agent.
§ 77. Same: Receipt of benefit by agent.
§ 78. Same: Enforcement of restitution against public policy — Benefit conferred upon municipal corporations.
§ 79. Same: Form of action against principal.

§ 45. **In general.** — One may honestly believe that a certain transaction amounts to a contract, when as a matter of fact some essential element of contract is wanting. A benefit conferred in misreliance upon such a supposed contract, under circumstances which make its retention unjust and its restitution not against policy, should be restored.

In the treatment of this subject, it will be expedient in the first place to distinguish the cases of gifts and gratuitous services from those of benefits conferred in reliance upon a supposed contract, and then to consider a variety of cases of the latter sort, which for purposes of convenience may be classified, according to the nature of the defect in the contract, as follows:

A. Acceptance of offer wanting.
B. Assumed fact non-existent.
C. Promise indefinite.
D. Required form wanting.
E. Contractual capacity wanting.
F. Authority of agent wanting.

§ 46. (I) **Misreliance on contract: Gifts and gratuitous services distinguished.** — If one, at the time of conferring a benefit upon another, confers it as a gift, that is, without intending thereby to establish contractual relations, it cannot afterward be claimed that the benefit was conferred in misreliance upon a supposed contract. Consequently, though the donor's intention may subsequently be altered, no quasi contractual obligation to make restitution will arise:

Cicotte v. *Church of St. Anne*, 1886, 60 Mich. 552; 27 N. W. 682: Action to recover the value of legal services rendered by the plaintiff, an attorney at law, for the benefit of the defendant church corporation of which he was a trustee. SHERWOOD J. (p. 558): "The simple fact that services are rendered does not raise a liability on the part of the person for whom they are rendered, even though done at his request, if the circumstances are such as to rebut the inference that compensation is to be made. When services are performed from kindly motives,

and with charitable intentions, the law will not imply a promise to compensate for them." [1]

This rule is interestingly exemplified in the two cases of *St. Joseph's Orphan Society* v. *Walpert* [2] and *Shepherd* v. *Young, Admr.*[3] In the former the plaintiff had supported and educated four children who were supposed, when received, to be penniless, but were afterwards discovered to have money; in the latter the plaintiff had supported a destitute grandchild, who was killed in a railway accident and whose administrator subsequently recovered damages from the company. In both cases relief was denied upon the ground that the support had been furnished without intention to charge therefor.

In an English case,[4] where the guardians of the poor had supplied necessaries to an infant who afterward became entitled to a legacy, the court allowed a recovery, saying, "I cannot agree that a pauper who takes relief in the shape of necessaries which keep him alive, takes that relief so entirely of right, that he is not under a legal liability to pay if he afterwards comes into money." Unless this decision rests solely

[1] Also: Hughes *v.* Dundee Mortgage, etc., Co., 1884, 21 Fed. 169, (legal services); Osier *v.* Hobbs, 1878, 33 Ark. 215, (care of child); Levy *v.* Gillis, 1897, 1 Pennewill (Del.) 119; 39 Atl. 785, (work in political campaign); Dunlap *v.* Allen, 1878, 90 Ill. 108, (services in family with which plaintiff was staying); Evans *v.* Henry, 1896, 66 Ill. App. 144, (services as foreman); Simon *v.* Tipton, 1899, 50 S. W. 1106 (Ky.), (services in obtaining mail contract); Ayland *v.* Rice, 1871, 23 La. Ann. 75, (friendly services as painter); Brown *v.* Tuttle, 1888, 80 Me. 162, 13 Atl. 583, (services of common law wife); Kerr *v.* Cusenbary, 1895, 60 Mo. App. 558, (procuring a lease); but see Hay *v.* Walker, 1877, 65 Mo. 17, (clerk and bookkeeper); Potter *v.* Carpenter, 1879, 76 N. Y. 157, (use of barn and teaming); Van Buren *v.* Reformed Church, 1872, 62 Barb. (N. Y. Sup. Ct.) 495, (church music); Pickslay *v.* Starr, 1894, 76 Hun 10; 27 N. Y. Supp. 616, (gift of check); Swires *v.* Parsons, 1843, 5 Watts & Serg. (Pa.) 357, (services of reputed wife); Gross *v.* Caldwell, 1892, 4 Wash, 670; 30 Pac. 1052, (mutual favors between brokers). See Kaufman Advertising Agency *v.* Snellenburgh, 1904, 43 Misc. Rep. 317; 88 N. Y. Supp. 199, ("write ups" to secure patronage).

[2] 1882, 80 Ky. 86.

[3] 1857, 8 Gray (Mass.) 152; 69 Am. Dec. 242.

[4] *In re* Clabbon, [1904] 2 Ch. 465, 467. See also Birkenhead Union *v.* Brookes, 1906, 70 J. P. 406.

upon considerations of public policy, it may be upheld only upon the theory that guardians of the poor furnish support to paupers, not as a gift, but with the intention of charging therefor and collecting if they can. If this be true, although the attitude of the pauper may prevent the formation of a contract, the case is at least one of dutiful intervention in the pauper's affairs under circumstances which raise an obligation to make restitution (*post*, §§ 202, 204). It has frequently been held in America, however, that in the absence of express contract a pauper incurs no liability for relief afforded him,[1] and this appears to be the law even where the pauper had property when the relief was furnished.[2]

Another illustration of the rule is furnished by the cases holding that one who performs the conditions contained in an offer of a reward in ignorance that a reward has been offered,[3] or with knowledge of the offer but without intention to claim the reward,[4] cannot recover. These cases, it is true, are decided upon the theory that there is no contract, but it seems equally clear that no quasi contractual obligation to pay the value of the service arises. Even where the service is rendered

[1] Jones County *v.* Norton, 1894, 91 Ia. 680; 60 N. W. 200, (insane pauper); Inhabitants of Deer-Isle *v.* Eaton, 1815, 12 Mass. 328; Chariton County *v.* Hartman, 1905, 190 Mo. 71; 88 S. W. 617; Charlestown *v.* Hubbard, 1838, 9 N. H. 195. But an obligation may be imposed upon the pauper by statute. See Kennebunkport *v.* Smith, 1843, 22 Me. 445.

[2] Inhabitants of Stow *v.* Sawyer, 1862, 3 Allen (Mass.) 515; City of Albany *v.* McNamara, 1889, 117 N. Y. 168; 22 N. E. 931; 6 L. R. A. 212. But see Chester *v.* Underhill, 1844, 16 N. H. 64, 66.

[3] Williams *v.* West Chicago, etc., R. Co., 1901, 191 Ill. 610; 61 N. E. 456; 85 Am. St. Rep. 278; Lee *v.* Flemingsburg, 1838, 7 Dana (37 Ky.) 28, (but see Auditor *v.* Ballard, 1873, 9 Bush (72 Ky.) 572; 15 Am. Rep. 728); Smith *v.* Vernon County, 1905, 188 Mo. 501; 87 S. W. 949; 70 L. R. A. 59; 107 Am. St. Rep. 324; Fitch *v.* Snedaker, 1868, 38 N. Y. 248; 97 Am. Dec. 791; Howland *v.* Lounds, 1873, 51 N. Y. 604; 10 Am. Rep. 654; Stamper *v.* Temple, 1845, 6 Humph. (25 Tenn.) 113; 44 Am. Dec. 296; Broadnax *v.* Ledbetter, 1907, 100 Tex. 375; 99 S. W. 1111; 9 L. R. A. (N. S.) 1057. *Contra:* Eagle *v.* Smith, 1871, 4 Houst. (Del.) 293; Dawkins *v.* Sappington, 1866, 26 Ind. 199; Auditor *v.* Ballard, 1873, 9 Bush (72 Ky.) 572; 15 Am. Rep. 728; Russel *v.* Stewart, 1872, 44 Vt. 170.

[4] Hewitt *v.* Anderson, 1880, 56 Cal. 476; 38 Am. Rep. 65.

with the intent to claim any reward that may be offered, but without knowledge that a reward *has* been offered, it can scarcely be said that there is misreliance upon a supposed contract.

§ 47. **Same: Peculiar doctrine of a few cases.** — In a few cases it has been held, apparently, that even though the plaintiff intends not to charge for his services, he may recover if the defendant is unaware of such intention:

Thomas v. *Thomasville Shooting Club*, 1897, 121 N. C. 238; 28 S. E. 293: Action for services rendered in securing hunting ground leases. FAIRCLOTH, C.J. (p. 240): "In apt time, the defendant asked the court to instruct the jury that if the plaintiff, when he got the leases, expected to make no charge, but expected remuneration afterwards by employment from the defendant, he could not recover for getting up the leases. This prayer was refused, but in lieu thereof his Honor charged that: 'If Thomas did not intend at the time to charge for getting up the leases, and this was known to the defendant, then he could not charge and recover for the same; but, if it was not known to the defendant that Thomas did not intend to charge, then Thomas could afterwards sue for and recover for his services in getting up the leases.' We see nothing prejudicial to the defendant in the charge as given, which included, in substance, the defendant's prayer, or so much thereof as he was entitled to. When the law implies a promise to pay for work done and accepted, and there is no agreed price, the laborer may recover the reasonable value of his services, unless there be some agreement or understanding that nothing is to be paid." [1]

In other words, the presumption of a contract, arising from the acceptance of services rendered, can be rebutted, not by evidence that the plaintiff did not intend to contract, but only by the establishment of an "agreement or understanding" that no contractual obligation was to result. This seems to go too far. Indeed, it is difficult upon any ground to support

[1] Also: Hay *v.* Walker, 1877, 65 Mo. 17, (clerk and bookkeeper). And see Prince *v.* McRae, 1881, 84 N. C. 674, (physician).

the decision. The plaintiff's lack of intent to contract is fatal to the theory of a genuine implied contract. Nor do the elements of quasi contractual obligation appear to be present, for one who renders services without the intention to charge therefor can hardly be said to rely upon a supposed right to compensation. If the decision is to be upheld, it must be upon the theory that the plaintiff rendered the services with the intention of acquiring a contract right to compensation, but with the further intention not to enforce that right in case his expectation of subsequent employment should be realized. Cases of this sort will be considered in the following section.

§ 48. **Same: Disappointed expectations.** — It is immaterial that a donor's hope or expectation that his donee will reciprocate his generosity or indirectly reward him is disappointed. Misreliance upon a supposed legal right, not upon a mere hope of reward, is the foundation of liability — a distinction which the courts not infrequently have been compelled to point out:

Osborn v. *Governors of Guy's Hospital*, 1727, 2 Str. 728: "The plaintiff brought a *quantum meruit pro opere et labore* in transacting Mr. Guy's stock affairs in the year 1720. It appeared he was no broker, but a friend; and it looked strongly as if he did not expect to be paid, but to be considered for it in his will. And the Chief Justice [RAYMOND] directed the jury, that if that was the case, they could not find for the plaintiff, though nothing was given him by the will; for they should consider how it was understood by the parties at the time of doing the business, and a man who expects to be made amends by a legacy cannot afterwards resort to his action."

Collyer v. *Collyer*, 1889, 113 N. Y. 442; 21 N. E. 114: Action for board and lodging furnished to defendant's intestate, who was a sister of the plaintiff. EARL, J. (p. 449): "It is undoubtedly true that the plaintiff showed great kindness and liberality to his sister. But no one can read this evidence and draw therefrom any inference that he expected any reward from his sister during her lifetime. He knew she was to the utmost degree penurious and miserly, and that she would hoard

her pelf and cling to her property so long as she lived. He doubtless expected that by his kindness to her she would be induced to make a favorable disposition of her property in his favor at her death. The fact that his expectation has been disappointed furnishes no ground for now stamping what at the time were acts of kindness and generosity with the mercenary features of a contract and compensation." [1]

La Fontain v. *Hayhurst*, 1896, 89 Me. 388; 36 Atl. 623: Action for board furnished defendant and his four children, and for services rendered. The plaintiff testified that she did not, at the time, expect any compensation; that she was engaged to be married to the defendant and rendered the services in expectation of marriage. The defendant subsequently married another woman. EMERY, J. (p. 392): "The services sued for here were no part of that contract [to marry], but merely incidents or consequences of it. The plaintiff expected no pay for them. Her expectation was confined to the promised marriage. With that she would have been satisfied. With damages for its loss she must be satisfied." [2]

[1] Additional cases of disappointed expectation of legacy: Le Sage *v.* Coussmaker, 1794, 1 Esp. 187; McClure *v.* Lenz, 1907, 40 Ind. App. 56; 80 N. E. 988; Lee *v.* Lee, 1834, 6 Gill & J. (Md.) 316; Mundorff *v.* Kilbourn, 1853, 4 Md. 459; Davison *v.* Davison, 1861, 13 N. J. Eq. (2 Beas.) 246; Martin *v.* Wright's Admrs., 1835, 13 Wend. (N. Y.) 460; 28 Am. Dec. 468; Little *v.* Dawson, 1791, 4 Dall. (Pa.) 111; *In re* Walker's Est., 1832, 3 Rawle (Pa.) 243; Messier *v.* Messier, 1912, R. I. ; 82 Atl. 996. But see Robeson *v.* Niles, 1889, 7 Mackey (18 D. C.) 182; Roberts *v.* Swift, 1793, 1 Yeats (Pa.) 209; 1 Am. Dec. 295.

Analogous to these cases is that of the architect who prepares and submits preliminary sketches in the hope of future employment. See Scott *v.* Maier, 1885, 56 Mich. 554; 23 N. W. 218; 56 Am. Rep. 402.

[2] *Accord:* Clary *v.* Clary, 1899, 93 Me. 220; 44 Atl. 921. But see Robinson *v.* Cumming, 1742, 2 Atkyns 409, in which Lord HARDWICKE says (p 409): "If a person has made his addresses to a lady for some time, upon a view of marriage, and, upon a reasonable expectation of success, makes presents to a considerable value, and she thinks proper to deceive him afterwards, it is very right that the presents themselves should be returned, or the value of them allowed to him; but, where presents are made only to introduce a person to a woman's acquaintance, and by means thereof to gain her favor, I look upon such a person only in the light of an adventurer, especially where there is a disproportion between the lady's fortune and his, and therefore, like all other adventurers, if he will run risques, and loses by the attempt, he must take it for his pains."

Similarly, if a benefit is conferred without the intention of charging the recipient, but in the expectation of payment from a third party, the recipient is not liable:

Coleman v. *United States*, 1894, 152 U. S. 96: 14 S. Ct. 473: Action to recover fees for legal services beneficial to the defendant. It was conceded that complainants did not expect the defendant would compensate them but looked for recompense to the clients who retained them. Mr. Justice SHIRAS, (p. 99): "We think that a promise to pay for services can only be implied when the court can see that they were rendered in such circumstances as authorized the party performing to entertain a reasonable expectation of their payment by the party benefited." [1]

The case of a benefit conferred as a gratuity though with the hope or expectation of voluntary reward should be distinguished from that of a benefit conferred in reliance upon a contract right to compensation but with the intention not to enforce such right in the event of an expected reciprocation or reward:

Baxter v. *Gray*, 1842, 4 Scott N. R. 374: ERSKINE, J. (p. 376): "It appears from the evidence that the plaintiff forbore to assert his claim in the lifetime of the testatrix, in the expectation that he would be better paid in the shape of a legacy. But, unless it is shown that the plaintiff's services were rendered upon a distinct *understanding* that he was to receive no remuneration except what the testatrix might think fit to leave him by her will, there is no answer to the action." [2]

Grandin v. *Admr. of Reading*, 1855, 10 N. J. Eq. (2 Stock.) 370: The Chancellor (p. 371): "This old lady was maintained by him for eight years. The law implies a contract on

[1] *Accord:* Morrison *v.* Jones, 1880, 6 Ill. App. 89, (legal services); Dodge *v.* Lansing, etc., Traction Co., 1908, 152 Mich. 100; 115 N. W. 1004, (services of secretary of corporation).

[2] See also Robeson *v.* Niles, 1889, 7 Mackey (18 D. C.) 182, (expectation of legacy); Cook *v.* Bates, 1896, 88 Me. 455; 34 Atl. 266, (mutual services); Roberts *v.* Swift, 1793, 1 Yeats (Pa.) 209; 1 Am. Dec. 295, (expectation of legacy); Von Carlowitz *v.* Bernstein, 1902, 28 Tex. Civ. App. 8; 66 S. W. 464, (expectation of legacy).

her part to remunerate him. To deprive him of the benefit of this implication, the court should be satisfied that he looked alone to Mrs. McCullough's will for remuneration, and intended to rely upon her generosity solely. I am not satisfied from the evidence that such was Joseph Reading's intention." [1]

§ 49. **Same: Incidental benefits.** — Where one, in the preservation of his own property or the promotion of his own interests, does something which is of incidental advantage to another, there is no obligation to pay the value of such advantage. Even if the person conferring the benefit supposes that he will be entitled to compensation, he can hardly be said to confer it in *reliance* upon such supposed right. It has accordingly been held that the United States could not recover from a railroad company the value of its services in rebuilding the railroad company's bridges, the work having been done as a military necessity; [2] that the owner of the lower part of a house was not liable for the advantage resulting to him from the repair of the roof by the owner of the upper part and roof; [3] that one who thickened and strengthened that part of an ancient party wall which was on his own land, in order to sustain a building he was erecting, was not entitled to recover from the owner of the adjoining property who subsequently used such strengthened wall; [4] that nothing could be recovered from the owner of a vessel by the underwriters who had her docked for the purpose of making necessary average repairs, although the docking of the vessel enabled the owner to make a survey required for the retention of her classification; [5] that one who in pumping out his own quarry incidentally freed another's quarry from

[1] See Hudson *v.* Hudson, 1891, 87 Ga. 678; 13 S. E. 583; 27 Am. St. Rep. 270, which, however, was a case of impossibility of performance by the defendant, a topic to be treated later. See *post*, § 127.

[2] United States *v.* Pacific R. Co., 1887, 120 U. S. 227; 7 S. Ct. 490.

[3] Loring *v.* Bacon, 1808, 4 Mass. 575.

[4] Walker *v.* Stetson, 1894, 162 Mass. 86; 38 N. E. 18; 44 Am. St. Rep. 350. For an interesting note on this case, see 8 Harv. Law Rev. 171.

[5] Ruabon Steamship Co. *v.* London Assurance, [1900] A. C. 6. Cf. Marine Ins. Co. *v.* China, etc., Co., 1886, 11 A. C. 573.

an accumulation of water could not recover for such service;[1] that one who was benefited by experiments made by another to test the value of certain patented inventions in which both are interested was under no obligation to pay for such benefit.[2]

§ 50. **Same: Burden of proof.** — Although the burden of proving reliance upon a supposed contract rests on the plaintiff, evidence that a substantial benefit has, with the defendant's acquiescence, been conferred upon him, will in most cases fairly lead to the inference that the plaintiff expected payment, and believed that the defendant was aware of such expectation, and will therefore establish a *prima facie* case of reliance.[3] This *prima facie* case will not be overcome by evidence that the plaintiff was aware of the defendant's poverty.[4] It may be overcome, however, by evidence that the benefit was conferred in an emergency — as in the saving of the defendant's property from fire or flood;[5] that similar benefits had previously

[1] Ulmer *v.* Farnsworth, 1888, 80 Me. 500; 15 Atl. 65.

[2] Davidson *v.* Westchester Gas Light Co., 1885, 99 N. Y. 558; 2 N. E. 892. See also Peters *v.* Gallagher, 1877, 37 Mich. 407, (floating another's logs in order to free his own).

In Griffin *v.* Sansom, 1903, 31 Tex. Civ. App. 560; 72 S. W. 864, the plaintiff was not allowed to recover one half of the cost of a party wall erected in the belief that defendant would be liable, and actually used by the defendant, but under circumstances not resulting in a contractual obligation. See also Sherred *v.* Cisco, 1851, 4 Sandf. (N. Y. Superior Ct.) 480; List *v.* Hornbrook, 1867, 2 W. Va. 340. On the obligation to contribute to cost of party walls generally, see note in 66 L. R. A. 673.

[3] See Hughes *v.* Dundee Mortgage, etc., Co., 1884, 21 Fed. 169; Hood *v.* League, 1894, 102 Ala. 228; 14 So. 572, (housekeeping for a paralytic); Hunt *v.* Osborn, 1907, 40 Ind. App. 646; 82 N. E. 933; Weston *v.* Davis, 1844, 24 Me. (11 Shep.) 374; Kiser *v.* Holladay, 1896, 29 Or. 338; 45 Pac. 759, (services of aged man on farm); Moyer's Appeal, 1886, 112 Pa. St. 290; 3 Atl. 811, (services of grandson); Wojahn *v.* Nat. Union Bank, 1911, 144 Wis. 646; 129 N. W. 1068.

[4] Worthington *v.* Plymouth, etc., R. Co., 1897, 168 Mass. 474; 47 N. E. 403, (corporation without funds).

[5] See Bartholomew *v.* Jackson, 1822, 20 Johns. (N. Y.) 28; 11 Am. Dec. 237: "If a man humanely bestows his labor, and even risks his life, in voluntarily aiding to preserve his neighbor's house from destruction by fire, the law considers the service rendered as gratuitous, and it, therefore, forms no ground of action." See also Hertzog *v.* Hertzog, 1857, 29 Pa. St. 465, 468.

been conferred by the plaintiff upon the defendant without request for payment;[1] or that the benefit was of a kind usually conferred without the expectation of pecuniary reward.[2]

§ 51. **Same: Effect of family relationship upon burden of proof.** — The presumption of an expectation of payment does not arise when services are rendered by one member of a family to another member, and in such a case it is necessary for the plaintiff to prove affirmatively that the services were rendered not as a gratuity but in reliance upon a supposed contract right to compensation:

Disbrow v. *Durand*, 1892, 54 N. J. L. 343; 24 Atl. 545: McGILL, Ch. (p. 345): "Ordinarily, where services are rendered and voluntarily accepted, the law will imply a promise on the part of the recipient to pay for them; but where the services are rendered by members of a family, living as one household, to each other, there will be no such implication, from the mere rendition and acceptance of the services. In order to recover for the services, the plaintiff must affirmatively show either that an express contract for the remuneration existed, or that the circumstances under which the services were rendered were such as exhibit a reasonable and proper expectation that there would be compensation. The reason of this exception to the ordinary rule is that the household family relationship is presumed to abound in reciprocal acts of kindness and good will, which tend to the mutual comfort and convenience of the members of the family, and are gratuitously performed; and, where that relationship appears, the ordinary implication of a promise to pay for services does not arise, because the presumption which supports such implication is nullified by the presumption that between members of a household services are gratuitously rendered. The proof of the services, and, as well, of the family relation, leaves the case in equipoise, from which the plaintiff must remove it or fail. The great majority of cases in which this exception to the ordinary rule has been

[1] See De Cesare *v.* Flauraud, 1902, 69 App. Div. 299; 74 N. Y. Supp. 593, (services as barber).

[2] Van Buren *v.* Reformed Church, 1872, 62 Barb. (N. Y.) 495, (services as organist in village church).

given effect have been between children and their parents, or the representatives of the parents' estate; and that fact appears to have led the courts of some of our sister states to speak of it as restricted to cases where such a relationship in blood existed; but it is not perceived how, within the reason for the exception, it is to be limited to mere propinquity of kindred. It rests upon the idea of the mutual dependence of those who are members of one immediate family, and such a family may exist, though composed of remote relations, and even of persons between whom there is no tie of blood." [1]

This exception to the general rule, as explained in the opinion just quoted, rests upon the family relationship, rather than that of consanguinity or affinity, and includes the cases of serv-

[1] *Accord:* Hogg *v.* Laster, 1892, 56 Ark. 382; 19 S. W. 975, (foster child); Friermuth *v.* Friermuth, 1873, 46 Cal. 42, (son); Walker *v.* Taylor, 1901, 28 Colo. 233; 64 Pac. 192, (foster child); Hudson *v.* Hudson, 1892, 90 Ga. 581; 16 S. E. 349, (son); Freeman *v.* Freeman, 1872, 65 Ill. 106, (son); Collar *v.* Patterson, 1891, 137 Ill. 403; 27 N. E. 604, (niece by marriage); Niesh *v.* Gannon, 1902, 198 Ill. 219; 64 N. E. 1000, (niece); Hill *v.* Hill, 1889, 121 Ind. 255; 23 N. E. 87, (brother-in-law); McGarvey *v.* Roods, 1887, 73 Ia. 363; 35 N. W. 488, (daughter); Wyley *v.* Bull, 1889, 41 Kan. 206; 20 Pac. 855, (foster child); Marple *v.* Morse, 1902, 180 Mass. 508; 62 N. E. 966, (mother); Harris *v.* Smith, 1889, 79 Mich. 54; 44 N. W. 169; 6 L. R. A. 702, (stepdaughter); Guenther *v.* Birkicht's Admr., 1856, 22 Mo. 439, (stepson); Lillard *v.* Wilson, 1903, 178 Mo. 145; 77 S. W. 74, (parents); Bell *v.* Rice, 1897, 50 Neb. 547; 70 N. W. 25, (stepfather); Disbrow *v.* Durand, 1892, 54 N. J. L. 343; 24 Atl. 545, (sister); Carpenter *v.* Weller, 1878, 15 Hun (N. Y. Sup. Ct.) 134, (sister); Stallings *v.* Ellis, 1904, 136 N. C. 69; 48 S. E. 548, (father); Mosteller's Appeal, 1858, 30 Pa. St. 473, (son); Houck's Executors *v.* Houck, 1882, 99 Pa. St. 552, (daughter); Dash *v.* Inabinet, 1898, 53 S. C. 382; 31 S. E. 297, (daughter); Gorrell *v.* Taylor, 1901, 107 Tenn. 568; 64 S. W. 888, (son-in-law); Andrus *v.* Foster, 1845, 17 Vt. 556, (foster child); Jackson's Admr. *v.* Jackson, 1898, 96 Va. 165; 31 S. E. 78, (grandson); Cann *v.* Cann, 1894, 40 W. Va. 138; 20 S. E. 910, (son); Bostwick *v.* Bostwick, 1888, 71 Wis. 273; 37 N. W. 405, (parents). But see *In re* Bishop's Estate, 1906, 130 Ia. 250; 106 N. W. 637, (father resided with widowed daughter; no presumption here of gratutity from family relation); Dance's Admr. *v.* Magruder, 1904, 26 Ky. L. Rep. 220; 80 S. W. 1120, (brother and sister: burden of proof on defendant to show that services consisting of nursing and washing clothes rendered gratuitously); Houser *v.* Sain, 1876, 74 N. C. 552, (grandfather and granddaughter).

ices rendered by an adopted member of a household,[1] by a visitor,[2] or by a concubine.[3] Apparently it does not cover the case of services rendered by one who, though a near blood relative, is not living under the defendant's roof.[4]

§ 52. (II) **Sundry instances of obligation classified according to nature of defect in contract: (A) Acceptance of offer wanting:** (1) **Because of ambiguity.** — It is essential to the formation of a contract that the acceptance conform to the requirements of the offer. But if there is an ambiguity in the terms of the offer, an acceptance which appears to coincide with the offer may in reality vary from it.[5] Of such cases *Turner* v. *Webster*[6] is an excellent example. The plaintiff offered to watch over certain property for the defendant for "$1.50 per day, and nights the same," meaning thereby $1.50 for a day of twelve hours, or $3.00 for a day of twenty-four hours. The defendant's agent understood the offer to mean $1.50 per day of twenty-four hours, and under that misunderstanding the plaintiff was employed. The promise of the plaintiff being to do certain work in consideration of $3.00, and that of the defendant to pay

[1] Hogg *v.* Laster, 1892, 56 Ark. 382; 19 S. W. 975; Stock *v.* Stoltz, 1891, 137 Ill. 349; 27 N. E. 604; Walker *v.* Taylor, 1901, 28 Colo. 233; 64 Pac. 192; Reeves' Estate *v.* Moore, 1892, 4 Ind. App. 492; 31 N. E. 44; McClure *v.* Lenz, 1907, 40 Ind. App. 56; 80 N. E. 988; Smith *v.* Johnson, 1876, 45 Ia. 308; Wyley *v.* Bull, 1889, 41 Kan. 206; 20 Pac. 855; Andrus *v.* Foster, 1845, 17 Vt. 556; Martin *v.* Martin, 1900, 108 Wis. 284; 84 N. W. 439; 81 Am. St. Rep. 895.

[2] Keegan *v.* Estate of Malone, 1883, 62 Ia. 208; 17 N. W. 461.

[3] Rhodes *v.* Stone, 1892, 63 Hun 624; 17 N. Y. Supp. 561; Swires *v.* Parsons, 1843, 5 Watts & S. (Pa.) 357.

"When the relation of concubinage is incidental, and is not the motive and cause of the parties living together, the concubine can recover from the estate of the deceased, if it has been enriched by her industry." — Succession of Llula, 1892, 44 La. Ann. 61, 63; 10 So. 406. See also Succession of Pereuilhet, 1871, 23 La. Ann. 294, 295; 8 Am. Rep. 595, where the court said: "An employer cannot pay off a female employee by robbing her of her virtue."

[4] Parker's Heirs *v.* Parker's Admr., 1859, 33 Ala. 459; Page *v.* Page, 1905, 73 N. H. 305; 61 Atl. 356; Moyer's Appeal, 1886, 112 Pa. St. 290; 3 Atl. 811; Williams *v.* Williams, 1902, 114 Wis. 79; 89 N. W. 835.

[5] Rupley *v.* Daggett, 1874, 74 Ill. 351, (mistake as to price of mare).

[6] 1880, 24 Kan. 38; 36 Am. Rep. 251.

$1.50 for such work, it is obvious that neither promise was supported by the consideration which it required and that the contract was therefore void. But the plaintiff having rendered services in reliance upon the supposed contract right to compensation was justly held to be entitled to restitution in value to the extent of the benefit derived by the defendant therefrom.[1]

If the ambiguity relates to the identity of the subject matter of an offer rather than to its terms, the same result follows. Thus, where it appeared, in a contract for the sale of cotton "ex *Peerless* from Bombay," that there were two vessels bearing the name *Peerless* sailing from Bombay, and that the seller had in mind one ship and the buyer the other, the contract was void.[2] But if it had further appeared that prior to the discovery of the misunderstanding and in reliance upon the supposed contract the buyer had paid the whole or a portion of the purchase price of the cotton, the seller would have been under an obligation to refund.[3]

So long as the transaction rests in parol, it may be shown that the offeree, in accepting the ambiguous offer, placed upon it the same interpretation as the offerer, in which case, of course, the contract would be valid and no quasi contractual obligation would arise. But when the ambiguity is carried into a written instrument, parol evidence will not be admitted to show what the parties meant unless the ambiguity is a latent one, *i.e.* not apparent on the face of the instrument but resulting from extraneous facts.[4] An example of quasi contractual obligation resulting from a patent ambiguity in a written instrument is found in an early Wisconsin case:

Cole v. *Clark*, 1851, 3 Pinn. (Wis.) 303: The plaintiff, in consideration of five hundred dollars, agreed under seal to

[1] *Accord:* Peerless Glass Co. *v.* Pacific Crockery, etc., Co., 1898, 121 Cal. 641; 54 Pac. 101, ("freight allowance" on sale of goods); Tucker *v.* Preston, 1887, 60 Vt. 473; 11 Atl. 726, (terms of employment).

[2] Raffles *v.* Wichelhaus, 1864, 2 Hurl. & C. 906.

[3] See DeWolff *v.* Howe, 1906, 112 App. Div. 104; 98 N. Y. Supp. 262, (sale of goods; mistake in sampling order).

[4] See Wigmore, "Evidence," §§ 2470–2473.

put in two waterwheels, "to drive each a run of stone in the flouring mills, and warrant the same, with two hundred inches of water to each wheel, to be measured at the bottom of the flume, to grind fifteen bushels per hour." The county judge charged the jury that if they found that *both* run of stone would grind the fifteen bushels per hour, the plaintiff had complied with the requirements of his contract. But the Supreme Court declared itself unable to take that view. "On the contrary," said HUBBELL, C.J. (p. 305), "we are all of the opinion that it is too indefinite and uncertain to admit of any interpretation as a matter of law. The offer to introduce *oral* evidence to explain the understanding of the parties was properly rejected. Such evidence is admissible when there is a *latent* ambiguity, which is made to appear by extraneous facts, and which may be made clear by *parol* proof. But the ambiguity in this case is *patent;* it appears on the face of the instrument; and it arises not from the use of words of art, or technical phrases, nor from the existence of any custom or usage, but from the failure of the parties so to use common and plain words as to express any definite idea. They have not told us themselves what they did mean; whether each run of stone was to grind fifteen bushels per hour, or whether both were to do it, and so their instrument is wholly void. The judgment of the county court must be reversed for this cause, and the case must go back for a new trial. The plaintiff then can recover *quantum meruit* upon the common counts, and no more."

§ 53. **Same: (2) Because of offeree's ignorance of offer.** — One who knows or has reason to believe that compensation is expected for goods or services tendered him ought not to accept such goods or services unless he intends to pay for them. Consequently, though he does not expressly promise to pay for them, the act of acceptance will be construed as a promise of payment and will ordinarily result in a genuine contractual obligation. But what if one accepts goods or services without knowledge or reason to believe that compensation is expected? The act of acceptance, under the circumstances, cannot fairly be said to raise an implied promise. But if the person who tenders the goods or services actually intends to charge for

them, and mistakenly believes that the recipient is aware of such expectation and therefore that the act of acceptance is to be construed as a promise to pay, the benefit resulting from the receipt of the goods or services is clearly a benefit conferred in misreliance upon a supposed contract. Whether or not the law requires such a benefit to be restored depends upon certain circumstances affecting the justice of such a requirement, hereafter to be considered (*post*, § 57).

§ 54. **Same**: (3) **Because of mistake as to identity of offerer.** — A transaction which is intended by both parties to effect the formation of a contract may fail of its purpose by reason of the offeree's mistake as to the identity of the offerer. For example, if A delivers ice to B, which B accepts and consumes in the reasonable belief that it comes from C, there is no contract.[1] A's tender of the ice amounts to an offer, but B's acceptance of the ice in the belief that it is supplied by C amounts to a promise to pay C and not A. A, however, has conferred a benefit upon B in reliance upon a supposed contract, and unless peculiar circumstances justify the retention of the benefit (*post*, § 55), quasi contractual obligation will result.

§ 55. **Same**: (4) **Circumstances justifying retention of benefit.** — Under some circumstances the recipient of a benefit conferred in reliance upon a supposed contract which turns out to be non-existent because the offer was never actually accepted may justly decline to make restitution. Whether or not this right to retain the benefit exists in a given case depends upon the answer to the following questions:

(*a*) Did the recipient of the benefit know or have reason to believe that compensation was expected?

(*b*) If not, has that which was received, or in case of money, its application, saved him from the expenditure of money or the assumption of pecuniary obligation?

It should be noted, however, that if, or as long as, the benefit conferred may be returned *in specie*, the obligation to restore

[1] See Boston Ice Co. *v.* Potter, 1877, 123 Mass. 28; 25 Am. Rep. 9, (which, however, as will be seen later, differs materially from the case supposed); Barnes *v.* Shoemaker, 1887, 112 Ind. 512; 14 N. E. 367.

is unaffected by these considerations. For whether or not the benefit was believed to be a gift, and whether or not it would have been acquired by contract, had it not been believed to be a gift, the fact that it was conferred in misreliance upon a supposed right to compensation makes its retention *in specie*, after the discovery of the mistake, clearly unjust. But if the thing received is consumed, as may happen, for example, in the case of household provisions, or is of such a character that it cannot in the nature of things be returned *in specie*, as in the case of services rendered, the justice of refusing restitution in value depends upon the answer to the questions above stated.

§ 56. **Same**: (*a*) **When defendant knows that compensation is expected: Boston Ice Co. v. Potter.** — As has been said (*ante*, § 54), while the acceptance of the goods or services by one who knows or has reason to believe that he is expected to pay for them will be held to indicate an intention to pay, it may happen that, because of a mistake as to the identity of the offerer, no contractual relation is established. In such a case the fact that it is impossible to return *in specie* that which was received does not justify a refusal to pay for it, and unless the person conferring the benefit is guilty of officiousness, restitution in value should be enforced.[1]

The well-known case of *Boston Ice Co.* v. *Potter*[2] is an interesting one in this connection. The action was for ice sold and delivered. It appeared "that the defendant, in 1873, was supplied with ice by the plaintiff, but, on account of some dissatisfaction with the manner of supply, terminated his contract with it; that the defendant then made a contract with the Citizens' Ice Company to furnish him with ice; that some time before April, 1874, the Citizens' Ice Company sold its business to the plaintiff, with the privilege of supplying ice to

[1] See John Weber & Co. *v.* Hearn, 1900, 49 App. Div. 213; 63 N. Y. Supp. 41, (Defendant thought he was dealing with a partnership, though in fact dealing with a corporation. Recovery on contract.); Brightman Bros. *v.* Griffin & Co., 1908, 70 Atl. 1057 (R. I.), (Plaintiffs were doing business under two firm names).

[2] 1877, 123 Mass. 28, 30; 25 Am. Rep. 9.

its customers;" that for one year thereafter the plaintiff supplied ice to the defendant, which ice was accepted and used by the defendant; and that the defendant received no notice of the sale of the Citizens' Ice Company's business and the assignment of its contracts to the plaintiff until after all the ice had been delivered. The court held that the plaintiff could not recover, and ENDICOTT, J., in the course of his opinion, said:

"A party has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. It may be of importance to him who performs the contract, as when he contracts with another to paint a picture, or write a book, or furnish articles of a particular kind, or when he relies upon the character or qualities of an individual, or has, as in this case, reasons why he does not wish to deal with a particular party. In all these cases, as he may contract with whom he pleases, the sufficiency of his reasons for so doing cannot be inquired into. If the defendant, before receiving the ice, or during its delivery, had received notice of the change, and that the Citizens' Ice Company could no longer perform its contract with him, it would have been his undoubted right to have rescinded the contract and to decline to have it executed by the plaintiff. But this he was unable to do, because the plaintiff failed to inform him of that which he had a right to know. If he had received notice and continued to take the ice as delivered, a contract would be implied."

This raises an interesting question in quasi contracts. If A renders a benefit to B with the intention of charging for it, and B, reasonably believing that he is dealing with C, accepts the benefit with the intention of paying for it, does the fact that A is a person with whom B for some reason does not wish to deal, justify B in refusing, when he learns the truth, to make restitution? Before considering this question, however, it may be noted that it was not necessarily involved, apparently, in *Boston Ice Co.* v. *Potter.* A contract to supply ice, such as the one in that case, is clearly assignable by the

seller.[1] And since the doctrine that one "has a right to select and determine with whom he will contract" applies only to the formation of contracts and in no way affects their assignability, the buyer must recognize the assignee whether he wishes to deal with him or not. Had the plaintiff, then, framed its pleadings upon the theory that it was the assignee of the Citizens' Ice Company — sueing in the name of the assignor as was at that time required in Massachusetts [2] — it would have been entitled to judgment. It thus appearing that the plaintiff had a valid and enforceable contract right to compensation for the ice supplied by him, there was no occasion for raising a quasi contractual obligation.[3] If, however, either the contract between the Citizens' Ice Company and Potter, or the assignment to the Boston Ice Company, had for any reason been void, the case would have presented the precise question stated above and now to be considered.

Two doctrines have been invoked to support the view that B is under no obligation to make restitution:

1. That one "has the right to select and determine with whom he will contract and cannot have another thrust upon him without his consent."

2. That officiousness in the plaintiff is a defense to a claim of quasi contractual liability.

The former doctrine is that relied upon by the court in *Boston Ice Co.* v. *Potter*. It is vigorously urged by Professor Keener, as follows: "To have allowed a recovery . . . in the Boston Ice Company *v.* Potter would have been, to use the language of Lord Mansfield in Stokes *v.* Lewis [1785, 1 Term R. 20], to have allowed a recovery against the defendant 'in spite of his teeth' and would have been entirely destructive of the doctrine that a man has the right to select his creditor."[4] But it is putting the doctrine too broadly to say that a man

[1] Woodward, "Assignability of Contract," 18 Harv. Law Rev. 23.

[2] See Foss *v.* Lowell, etc., Bank, 1873, 111 Mass. 285.

[3] See article by Professor Costigan in 7 Columbia Law Rev. 32, in which the case of Boston Ice Co. *v.* Potter is thoroughly analyzed and considered.

[4] "Quasi-Contracts," pp. 360, 361.

has a right to select his *creditor* — using the term in its ordinary meaning. If that were true, as Professor Costigan has said, it " would be entirely destructive of the law of quasi contracts; for a plaintiff is never selected by the defendant as his quasi contract creditor." [1] And while it is true that one has a right to determine with whom he will *contract*, that is obviously a doctrine which applies only to the formation of geninue contracts. It is, in fact, only another way of saying that genuine contracts rest upon mutual assent.

The latter doctrine — that the plaintiff's officiousness is a defense to a claim of quasi contractual liability — while not referred to in *Boston Ice Co.* v. *Potter*, is suggested by Professor Keener in his discussion of that case.[2] It is, of course, a recognized doctrine of quasi contract that an officious intermeddler, though he enrich another, may be denied restitution (*post*, § 196). But the mere fact that A is *persona non grata*, or that for some other reason B does not wish to deal with him, is insufficient, without other evidence, to convict A of officious meddling. Knowledge of B's feeling, on the part of A, must also be shown, and even then the proof may not be conclusive. Let it be supposed, for example, that A is aware of B's feeling, but confers the benefit in performance of a contract, believed to be valid, between B and C, of which he is the assignee. Is A guilty of officiousness? Under some circumstances, no doubt, it would be an impertinence for A to acquire by assignment a contract with B, who, to his knowledge, does not wish to deal with him. Under other circumstances, as for instance where the assignment of the contract is involved in the sale of a business or is taken in satisfaction of a debt, the act would be entirely free from impropriety. Rarely, it is believed, would it be fair to regard the purchase and performance of the contract by A as conduct so inexcusably officious as to justify B in refusing to make restitution.

It may be argued that whether or not A's purchase of the contract is reprehensible, he is plainly delinquent in failing to

[1] 7 Columbia Law Rev. 45 n.
[2] "Quasi-Contracts," p. 360.

notify B of the fact that he has replaced the original contractor, C. This point is the one relied upon by Professor Keener to support his conclusion that the plaintiff in *Boston Ice Co.* v. *Potter* was officious. "This case differs from the case of Boulton *v.* Jones," [1] he says, "in that the plaintiff knew that the defendant did not desire to deal with him, and was, therefore, officious in supplying him with ice *without notifying him of that fact.*" [2] But what is there to suggest to A, under the circumstances, that he owes a duty to reveal the fact? When it is remembered that he believes himself to be the assignee of a valid contract, and consequently that B cannot avoid dealing with him even if informed of the assignment, it will be seen that he would feel no obligation whatever to give B such information. Moreover, if, as might well be, his concealment of the fact were prompted by consideration for the feelings of B, he would deserve commendation rather than blame.[3]

§ 57. **Same**: (*b*) **When defendant believes that compensation is not expected.** — Ordinarily, if a benefit is conferred with the intention of charging therefor, the circumstances preclude the recipient from subsequently claiming with reason that he believed that no compensation was expected. Occasionally, however, a benefit so conferred may be accepted in the reasonable belief, either that it is a gift, or that for some other reason payment will not be required. To take a simple example, let it be supposed that A sends a barrel of apples to B, reasonably expecting, as a result of their previous course of dealing, that B will return the goods if he does not wish to purchase them; but B, as a result of misinformation to the effect that A is giving a barrel of apples to each of his customers, accepts the goods in the belief, reasonable under the circumstances, that compensation is not expected. In such a case the acceptance of the benefit cannot be said to evince an intent to contract, and consequently imposes upon the recipient no contract obligation. But the benefit has been conferred in misreliance

[1] 1857, 27 L. J. Exch. 117; s. c. 2 Hurl. & N. 564.
[2] "Quasi-Contracts," p. 360. The italics are the present author's.
[3] See Professor Costigan's article, 7 Columbia Law Rev. 32, 42.

upon a supposed contract, and the question arises — Is there a quasi contractual obligation to make restitution? Is the retention of the benefit unjust? If the benefit may be returned *in specie*, it is. If the benefit may not be returned *in specie*, the answer must depend upon the result of a further inquiry — Did that which the conferee received, or, in the case of money, its application, save him from the expenditure of money, or the assumption of pecuniary obligation? If it did, a failure to make restitution would be a distinct injustice, and to refuse to enforce it would be to permit the recipient of the benefit to profit by the conferrer's mistake. If it did not, there is no injustice in a refusal to make restitution. To compel restitution would be merely to shift the burden of a misunderstanding from the shoulders of one innocent man to those of another.

Whether or not, in a given case, the defendant has been saved from the expenditure of money or the assumption of obligation, may be a difficult question. But the plaintiff should be given the benefit of a doubt. In other words, proof that the defendant reasonably believed that no compensation was expected, together with proof that restitution *in specie* cannot be made, constitutes no defense to the charge of unjust enrichment. It must further appear that the receipt of the benefit did not save him from the expenditure of money or the assumption of obligation. Consequently, where there is room for the supposition that the defendant might either have accepted the plaintiff's goods or services, or have obtained similar goods or services elsewhere, had he known that he would have to pay for them, there is ground for requiring him to make restitution. Thus, he should be compelled to pay for goods in the nature of necessaries for his family or his business received and consumed by him in the reasonable belief that compensation was not expected. But where the only reasonable inference from the facts proven is that the defendant would not have obtained the goods or services, or similar goods or services, in any event — as, for example, where the goods were of a sort never purchased by him or his family — a case for enforcing restitution is not established.

Again, in case the benefit consisted of money which has been expended, if it may reasonably be supposed that the conferee might have expended his own money as he expended that which he believed to be a gift, he ought to be compelled to make restitution; but if it clearly appears that he has used the money received from the plaintiff in the purchase of luxuries which otherwise he would not have obtained, restitution should not be enforced.

It may be that the test of the justice or injustice of the defendant's retention of a benefit, above suggested, is impracticable of application; but it would seem to present no greater difficulty than is frequently encountered in determining whether or not, under the circumstances of a particular case, articles furnished to an infant are necessaries.

§ 58. **Same**: (*c*) **Concord Coal Co. v. Ferrin, and Boulton v. Jones.** — A failure to make the distinction pointed out in the last section, it is submitted, brought about an unjust result in the New Hampshire case of *Concord Coal Co.* v. *Ferrin.*[1] One Bean, being indebted to the defendants and having been requested to make payment, told the defendants that Day (one of the plaintiff firm) was backing him and that he would get the plaintiffs to furnish a ton of coal for application as payment upon his indebtedness; and the defendants agreed to accept a ton of coal in payment. Bean thereupon informed the plaintiffs that the defendants wanted a ton of coal, without saying anything about the arrangement he had made with them. The coal was delivered to the defendants and used by them in their business. In an action to recover the value of the coal it was held that the defendant was under no obligation to make restitution. Said PARSONS, J.:

"It is contended that the plaintiffs can recover because otherwise the defendants would be unjustly enriched at the plaintiffs' expense. But that fact is not found. Both parties trusted and were deceived by Bean. If the plaintiffs cannot recover of the defendants for the coal, they have a claim against Bean for its

[1] 1901, 71 N. H. 33, 36; 51 Atl. 283; 93 Am. St. Rep. 496.

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value; while if the defendants were obliged to pay for the coal, they would also have a claim against Bean for the same amount. It may be assumed that Bean is worthless. But there is no equitable reason why the plaintiffs rather than the defendants should be released from the consequences of their trust in Bean. In view of the inference of freedom from fault which the general verdict gives for the defendants, the defendants' equity is at least equal with that of the plaintiffs."

It is true that in the sense of freedom from responsibility for the misunderstanding, the equities of the parties were equal. And if it had been an article of luxury that the plaintiffs delivered to the defendants and that the defendants consumed, it might have been a hardship to compel the defendants to pay the plaintiffs its value. But it was coal which was "used by them in their business," — something which the defendants undoubtedly would have purchased in any event. True, they might have obtained a better grade of coal, or might have purchased at a lower price, but all the plaintiffs asked was the *value* of the coal which they in good faith delivered and which the defendants consumed. To that extent, it is submitted, they were entitled to restitution.

An English case, in some respects similar to *Concord Coal Co.* v. *Ferrin*, but in which it is not so clear that an unjust result was reached, is *Boulton* v. *Jones*.[1] It there appeared that the defendant sent a written order for hose pipe to one Brocklehurst, a hose pipe manufacturer, who had that day, unknown to the defendant, sold his stock in trade and assigned his business to the plaintiff. The plaintiff supplied the goods without any intimation of the change that had taken place in the business, and when payment was requested the goods had been consumed. The defendant, who had a set-off against Brocklehurst, refused to pay the plaintiff, and was sustained by the court. Since the offer was not accepted by the person to whom it was made, no contract obligation resulted from the transaction. Did an obligation in quasi contract arise? Assuming the set-off to have been at least equal to the value of

[1] 1857, 2 Hurl. & N. 564; 27 L. J. Exch. 117.

the goods ordered, it is clear that the defendant did not suppose that he would have to pay out money for the goods. And though it is probable that he would have purchased the goods, either from the plaintiff or from some one else, in any event, the want of evidence as to the use to which the goods were put makes it impossible to say with reasonable certainty that he would have done so. Furthermore, it is not altogether clear that the plaintiff, when he supplied the goods, was under any misapprehension as to his legal rights. It was evident that the defendant's offer was made to Brocklehurst. Unless, therefore, the plaintiff was ignorant of the fundamental principles governing the formation of contract, he must have relied, not upon the supposed contract right to supply the goods, but upon the defendant's indifference as to the source of his supply. If so, he assumed the risk of defendant's refusal to pay, and was not entitled to relief.

If the set-off which the defendant had against Brocklehurst amounted to less than the value of the goods furnished by the plaintiff, the balance was clearly recoverable. For, to the extent of such balance, the defendant must have expected to pay out money for the goods, and it can hardly be said that the plaintiff acted officiously in the premises.

§ 59. (B) **Assumed fact non-existent.** — If, in making a contract, it is taken for granted by both parties that a certain fact exists, the non-existence of which would make the contract impossible of performance, and the fact does not exist, the contract is void. The reason for this rule has been variously stated. By Professor Harriman it is said that the existence of the fact is a condition precedent to the formation of the contract;[1] by Professor Langdell, that if the fact upon which the promise depends does not exist there is no promise at all.[2] Perhaps it is best to say that, while there is an agreement, the law, in the interest of justice, attaches no obligation.

The existence of a fact may be said to be taken for granted by both parties only when neither party assumes the risk of its

[1] Harriman, "Contracts," §§ 305, 306.
[2] Langdell, "Summary of the Law of Contracts," § 28.

non-existence. Where one party undertakes that the fact exists, he assumes the risk, and though its non-existence may give to the other party the right to rescind the contract, it will not make the contract void. Thus, in the case of a sale of a cargo supposed to be on board a certain vessel, if the seller engages that there is a cargo, the non-existence of a cargo will relieve the buyer from the obligation to pay the price, or, if the price is paid, will give the buyer the right to rescind the contract and recover the price, but it will not relieve the seller from his engagement;[1] if the seller does not undertake that there is a cargo, the existence of the cargo may be said to be taken for granted by both parties, and if, in fact, there is no cargo, the contract is void.[2]

§ 60. **Same**: (1) **Sale or lease of non-existent property.**—The fact most frequently taken for granted, in the formation of contracts, is the existence of the subject matter, or the thing concerning which the parties contract. Thus, in contracts for the sale of specific personal property, its existence at the time of the sale is generally assumed. If the property has perished or been destroyed, the contract is void.[3] The same view has been taken of the sale of non-existent realty;[4] of the transfer of void or spurious securities;[5] of the assignment of a void lease.[6] And in all such cases, money paid in misreliance upon the void contract is recoverable:

[1] Davison *v.* Von Lingen, 1884, 113 U. S. 40; 5 S. Ct. 346.

[2] Couturier *v.* Hastie, 1856, 5 H. L. Cas. 673.

[3] Strickland *v.* Turner, 1852, 7 Exch. 208, (annuity); Couturier *v.* Hastie, 1856, 5 H. L. Cas. 673, (cargo of grain); Gibson *v.* Pelkie, 1877, 37 Mich. 380, (judgment); Edwards *v.* Trinity, etc., R. Co., 1909, 54 Tex. Civ. App. 334; 118 S. W. 572, 575–6, (gravel in the land); St. Louis, etc., R. Co. *v.* Johnston, 1910, Tex. Civ. App. ; 125 S. W. 61, 62–3, (rock in quarry); Uniform Sales Act, § 7, subsection 1. See Williston, "Sales," § 161. See also Franklin *v.* Long, 1836, 7 Gill & J. (Md.) 407, (slave who had died).

[4] D'Utricht *v.* Melchor, 1789, 1 Dall. (Pa.) 428. See, however, Goldman *v.* Hadley, 1909, Tex. Civ. App. ; 122 S. W. 282, (sale of land between two surveys, where gap did not exist: no recovery in absence of fraud).

[5] Young *v.* Cole, 1837, 3 Bing. N. C. 724, (void bonds).

[6] Martin *v.* McCormick, 1854, 8 N. Y. 331.

Strickland v. *Turner*, 1852, 7 Exch. 208: Assumpsit to recover the purchase price paid for an annuity payable during the life of a third person. At the time of the purchase the third person had died, so the annuity had ceased to exist. POLLOCK, C. B. (p. 217): "The question between the parties is this — whether the purchase took effect during the existence of the annuity. If it did, though but for an instant, the plaintiff is not entitled to succeed; for he purchased the annuity, and cannot complain that in so doing he made a bad bargain, as the events have turned out. But if, on the contrary, the annuity has ceased to exist before his purchase, then he has got nothing for his purchase money, and is entitled to recover it back. . . ."

Martin v. *McCormick*, 1854, 8 N. Y. 331: Action by the owner of land to recover money paid in consideration of the assignment to him of a lease given to the defendant by a third party. It appeared that the lease was void, a fact unknown to both parties at the time of the assignment. JOHNSON, J. (p. 334): "The parties did not deal with each other upon the footing of the compromise of a doubtful or doubted claim, but upon the ground of a conceded right in the defendant. He was assumed by both of them to have become the owner of a term for one hundred years in the premises in question, and the parties dealt with each other upon that basis for the sale and purchase of that interest. . . . Now the term which was the subject of the contract, contrary to the supposition of both parties, had no existence, and in all that class of cases where there is mutual error as to the existence of the subject matter of the contract, a recision may be had." [1]

[1] *Accord:* Jones *v.* Ryde, 1814, 5 Taunt, 488, (navy bill void because of alteration); Young *v.* Cole, 1837, 3 Bing. N. C. 724, (Guatamala bonds void because not properly stamped); Gompertz *v.* Bartlett, 1853, 2 El. & Bl. 849, (bill of exchange thought to be a foreign bill but in fact a domestic bill and consequently unavailable for want of a stamp); Franklin *v.* Long, 1836, 7 Gill & J. (Md.) 407, (slave who had died); Young *v.* Adams, 1810, 6 Mass. 182, (counterfeit bill); Brewster *v.* Burnett, 1878, 125 Mass. 68; 28 Am. Rep. 203, (counterfeit bonds); McGoren *v.* Avery, 1877, 37 Mich. 119, (void certificate of execution sale); Wood *v.* Sheldon, 1880, 42 N. J. L. 421; 36 Am. Rep. 523, (void dividend certificate); D'Utricht *v.* Melchor, 1789, 1 Dall. (Pa.) 428, (non-existent land); Hurd *v.* Hall, 1860, 12 Wis. 125, (void school land certificates); Paul *v.* Kenosha, 1867, 22 Wis. 256; 94 Am. Dec. 598,

Closely analogous to cases of the sale of goods which have been destroyed is that of *Ketchum* v. *Catlin*,[1] where in the sale of produce it was assumed that the goods were at a certain place, whereas in fact they were elsewhere. In an action to recover the amount paid upon the purchase price, the court said:

"The plaintiff, in this case, wanted the property he contracted for at Whitehall, and not at Boston; and it was upon the supposition, that he was to receive the property at Whitehall, that he entered into the contract. We think this was material; and that without it the contract would not have been made; and if so, the right of property did not pass from Catlin to the plaintiff. When it was discovered, that the parties, in making this contract, had proceeded upon a mutual mistake as to the *situs* of the property, they mutually had the privilege of being remitted to their original rights."

§ 61. **Same**: (2) **Insurance of non-existent risk.** — Upon the same principle as governs the cases considered in the preceding section, premiums paid on a policy of marine insurance by one who in reality had no goods on board, or for a voyage that was never begun, have been held recoverable. The existence of a risk is assumed by both parties, whereas in fact there is no risk and consequently nothing to which the contract of insurance can attach:[2]

Martin v. *Sitwell*, 1692, 1 Shower 156: Indebitatus assumpsit to recover a premium paid for the plaintiff on a policy of marine insurance, the plaintiff having had no

(void bonds). And see Tucker *v.* Denton, 1907, 106 S. W. 280 (Ky.), where it was held that money paid for the cancellation of a contract for the purchase of land, supposed by both parties to be enforceable but in reality unenforceable under the Statute of Frauds, might be recovered.

[1] 1849, 21 Vt. 191, 195.

[2] The same is true, of course, where property insured has perished or has been destroyed before the making of the contract. In such a case the contract of insurance is not valid unless it is antedated and both parties are ignorant of the loss. See Hallock *v.* Ins. Co., 1857, 26 N. J. L. 268; Hughes *v.* Ins. Co., 1873, 44 How. Pr. (N. Y.), 351.

goods on board. HOLT, C.J. (p. 157): "And as to our case the money is not only to be returned by the custom, but the policy is made originally void, the party for whose use it was made having no goods on board; so that by this discovery the money was received without any reason, occasion, or consideration, and consequently it was originally received to the plaintiff's use." [1]

Stevenson v. *Snow*, 1761, 3 Burr. 1237: Action for money had and received to recover part of a marine insurance premium. The voyage was to be from London to Halifax, with convoy from Portsmouth to Halifax, but when the vessel reached Portsmouth, the convoy had gone. WILMOT, J. (p. 1241): "If the risque was once *begun*, the insured shall not deviate or return back, and then say 'I will go no farther under this contract, but will have my premium returned.' But upon *this* policy, there are *two distinct* points of time, in effect two voyages, which were clearly in the contemplation of the parties: and *only one* of the two voyages was made; the *other*, not at all entered upon. It was a *conditional* contract; and the second voyage was not begun. Therefore the premium must be returned: for upon this second part of the voyage, the *risque never took place at all.*" [2]

In *McCulloch* v. *Royal Exchange Assurance Co.*[3] it was held that one who had insured a vessel under the mistaken supposition that he was the owner, could not, in an action commenced after the completion of the voyage, recover the premiums paid for such insurance. The court conceded that if the mistake had been discovered and the return of the premium demanded before the commencement of the voyage, the plaintiff would have succeeded; but declared that to enforce a demand made after the arrival of the vessel "would place underwriters in a very awkward situation." If it had in fact appeared that the defendant had so altered its position that to return the premium would involve it in a loss, restitution would

[1] *Accord:* Toppan *v.* Atkinson, 1807, 2 Mass. 365; Steinback *v.* Rhinelander, 1803, 3 Johns. Cas. (N. Y.) 269.

[2] See Steinback *v.* Rhinelander, 1803, 3 Johns. Cas. (N. Y.) 269.

[3] 1813, 3 Camp. 406, 410.

properly have been denied. But in the absence of such evidence, the delay in making a demand would seem to be immaterial, aside from the running of the statute of limitations.[1]

§ 62. **Same**: (3) **Assignment of void patent.** — The assignment of a void patent presents a particularly interesting case of the non-existence of the thing concerning which the parties contract. Such an assignment purports to transfer the exclusive privilege or monopoly, under grant of the state, to make, use, and vend, and to authorize others to make, use, and vend, the subject matter of an invention. If for any reason the grant of the patent is void, the exclusive privilege or monopoly does not exist. And since there is no implied warrant of the validity of the grant,[2] it ought to be held that the assignment is void for non-existence of the subject matter, and that money paid in misreliance upon its validity may be recovered. Such, apparently, is the law in the United States.[3] But in England and Canada it is held that the assignment of a patent is valid and enforceable though the patent itself is void.[4] This view probably rests upon the theory that the assignment purports to transfer, not a monopoly, but merely the assignor's rights under his letters patent, whatever they may turn out to be, and that the assignee therefore assumes the risk of the invalidity of the

[1] See Keener, "Quasi-Contracts," p. 118. And compare Steinback *v.* Rhinelander, 1803, 3 Johns. Cas. (N. Y.) 269; New Holland Turnpike Co. *v.* Ins. Co., 1891, 144 Pa. St. 541; 22 Atl. 923.

[2] Hall *v.* Conder, 1857, 2 C. B. N. S. 22; Hiatt *v.* Twomey, 1836, 1 Dev. & Bat. Eq. (21 N. C.) 315; 3 Robinson, "Patents," § 1232.

[3] In Darst *v.* Brockway, 1842, 11 Ohio 462, it is held that money paid by the assignee may be recovered. Hiatt *v.* Twomey, 1836, 1 Dev. & Bat. Eq. (21 N. C.) 315, *contra.* In the following cases it is held that the invalidity of the patent is a defense to an action by the assignor to recover the purchase price or to an action on a note for the purchase price: Dickinson *v.* Hall, 1833, 14 Pick. (Mass.) 217; 25 Am. Dec. 390; Lester *v.* Palmer, 1862, 4 Allen (Mass.) 145; Harlow *v.* Putnam, 1878, 124 Mass. 553; Keith *v.* Hobbs, 1878, 69 Mo. 84; Herzog *v.* Heyman, 1897, 151 N. Y. 587; 45 N. E. 1127; Geiger *v.* Cook, 1842, 3 Watts & S. (Pa.) 266. And see Hamilton *v.* Park, 1900, 125 Mich. 72; 83 N. W. 1018.

[4] Hall *v.* Conder, 1857, 2 C. B. N. S. 22; Liardet *v.* Hammond, etc., Co., 1883, 31 W. R. 710; Vermilyea *v.* Canniff, 1886, 12 Ont. 164.

grant.[1] If the assignment is so worded as to indicate that the parties regard the patent as of doubtful validity, such a construction may be justified.[2] In the absence of such evidence it seems somewhat strained.

A license, in the law of patents, is not, accurately speaking, a transfer of the licensor's monopoly, but a permit to make, use, or vend the thing patented under protection of the patent. Essentially it is merely an agreement by the licensor that he will not hinder or attempt to prevent the licensee from making, using, or vending the thing upon which the licensor claims a monopoly.[3] The validity of the patent may be an assumed fact, but it is not a fact the non-existence of which makes the contract impossible of performance, since all that the contract requires is non-interference by the licensor. Consequently, though the patent is void, the license is valid and enforceable so long as the licensee continues without molestation to operate under it.[4]

[1] In Hall *v.* Conder, *supra*, WILLIAMS, J., said (p. 42): "They contracted for the patent such as it was, each acting on his own judgment," and distinguished the earlier case of Chanters *v.* Leese, 1838, 4 Mees. & W. 295, upon the ground that there the assignor expressly contracted that the assignee should have the *exclusive right* to sell certain things for which the patents had been obtained.

[2] See Johnson *v.* Willimantic Linen Co., 1866, 33 Conn. 436, in which the court said (p. 443): "Where, as in this case, there is . . . clear evidence on the face of the instrument that the parties mutually contemplated the possibility, if not the probability that the patent was invalid, and provided by the form of the instrument and its stipulation for the contingency, it is very clear that there is no ground on which the vendee can be permitted to set up a failure of consideration." See also, Gilmore *v.* Aiken, 1875, 118 Mass. 94; Herzog *v.* Heyman, 1897, 151 N. Y. 587; 45 N. E. 1127.

[3] See Heaton, etc., Co. *v.* Eureka, etc., Co., 1896, 77 Fed. 288, 290; 25 C. C. A. 267; 47 U. S. App. 146; 35 L. R. A. 728.

[4] Lawes *v.* Purser, 1856, 6 Ell. & B. 930; Crossley *v.* Dixon, 1863, 10 H. L. Cas. 293; Holmes *v.* McGill, 1901, 108 Fed. 238; 47 C. C. A. 296; Rhodes *v.* Ashurst, 1898, 176 Ill. 351; 52 N. E. 118; Jones *v.* Burnham, 1877, 67 Me. 93; 24 Am. Rep. 10; Standard Button, etc., Co. *v.* Ellis, 1893, 159 Mass. 448; 34 N. E. 682; Strong *v.* Carver Cotton Gin Co., 1907, 197 Mass. 53; 83 N. E. 328, 330; 14 L. R. A. (N. S.) 274; Marston *v.* Swett, 1876, 66 N. Y. 206; 23 Am. Rep. 43. See also Ross *v.* Dowden Mfg. Co., 1909, 147 Ia. 180; 123 N. W. 182.

In many cases allowing the recovery of royalties under void patents, the decision is rested upon the doctrine of estoppel. Unless the licensee

It follows (upon the principle of § 18, *ante*) that royalties paid by the licensee may not be recovered.[1]

The distinction between an assignment of a patent and a license has frequently been overlooked. The leading English case of *Taylor* v. *Hare*,[2] which held that royalties paid by a licensee under a void patent could not be recovered, is criticised by Professor Keener,[3] apparently upon the theory that the licensee had bought "the right to manufacture under the letters patent," which since the patent was void, the licensor did not have to sell. If this is the true theory of the nature of a license, the criticism is deserved; but as has been said, the courts have construed licenses to be merely agreements by the licensor not to interfere with the licensee.

§ 63. **Same**: (4) **Sale of non-existent or defective title.** — The ability of one who contracts to sell property, either real or personal, to give a good title, is never regarded as a fact the non-existence of which invalidates the contract. If the contract contains an express or implied warranty of title,[4] the vendor is liable in damages for the breach of the warranty. Under what circumstances one may elect to rescind a contract because of a breach by the other party and sue for restitution instead of for damages is elsewhere considered (*post*, § 260 *et seq.*).

has acknowledged the validity of the patent (as in Hyatt *v.* Ingalls, 1891, 124 N. Y. 93; 26 N. E. 285), the doctrine would seem to be inapplicable.

Even though the license contains an express stipulation that the licensee's privilege shall be exclusive, it is held that the invalidity of the patent does not invalidate the license. See Holmes *v.* McGill, *supra*.

[1] Taylor *v.* Hare, 1805, 1 Bos. & Pul. N. R. 260; Schwarzenbach *v.* Odorless, etc., Co., 1885, 65 Md. 34; 3 Atl. 676; 57 Am. Rep. 301.

[2] 1805, 1 Bos. & Pul. N. R. 260.

[3] "Quasi-Contracts," pp. 37–39.

[4] Ordinarily, in a contract to sell or a sale of chattels, there is an implied warranty of title. Williston, "Sales," §§ 216–220. The same is true of executory contracts for the sale of land. Burwell *v.* Jackson, 1854, 9 N. Y. 535; Seld. Notes 243; Moore *v.* Williams, 1889, 115 N. Y. 586, 592; 22 N. E. 233; Rawle, "Covenants for Title," § 32. But in a conveyance of land there is no implied warranty. Dorsey *v.* Jackman, 1814, 1 Serg. & R. (Pa.) 42; 7 Am. Dec. 611; Rawle, "Covenants for Title," § 320.

If, on the other hand, the contract is without warranty of title express or implied, the purchaser is held to have assumed the risk of the vendor's inability to give a good title and consequently is without a remedy.[1]

§ 64. (C) **Promise indefinite.** — A promise so general or indefinite that it does not enable the courts to determine the nature and extent of the obligation assumed must be regarded as no promise at all. Such has been the fate of a promise to pay good wages;[2] a promise to convey a hundred acres of land, the land not being described;[3] a promise to divide profits, no rate of division being indicated.[4] Instances might be multiplied.[5] A benefit conferred in the honest, though mistaken, belief that such a promise is binding ought in justice to be restored. Restitution is accordingly enforced:

Sherman v. *Kitsmiller*, 1827, 17 Serg. & R. (Pa.) 45: — Action on a promise by defendant's intestate that in consideration that the plaintiff would live with him until her marriage he would give her one hundred acres of land. DUNCAN, J. (p. 49): "This vague and void promise, incapable of specific execution, because it has nothing specific in it, would not prevent the plaintiffs from recovering on a *quantum meruit* for the value of this young woman's services, until her marriage. If this promise had been, that, in consideration of one hundred pounds, the defendant's testator promised to convey her one hundred acres of land, chancery would not decree a specific performance, or decree a conveyance of any particular

[1] Dorsey *v.* Jackman, 1814, 1 Serg. & R. (Pa.) 42; 7 Am. Dec. 611; Rawle, "Covenants for Title," § 321 and cases there cited. But see Earle *v.* Bickford, 1863, 6 Allen (Mass.) 549; 83 Am. Dec. 65, where it was held that one who has undertaken to sell a part of the estate of an insolvent debtor, as assignee thereof, but who by reason of a want of jurisdiction in the judge who assumed to act in the case, had no authority to do so, is liable to the purchaser in assumpsit for the money received as the price thereof.

[2] Fairplay School Tp. *v.* O'Neal, 1890, 127 Ind. 95; 26 N. E. 686.

[3] Sherman *v.* Kitsmiller, 1827, 17 Serg. & R. (Pa.) 45.

[4] Young *v.* Farwell, 1893, 146 Ill. 466; 34 N. E. 373; Butler *v.* Kemmerer, 1907, 218 Pa. St. 242; 67 Atl. 332.

[5] See Harriman, "Contracts," §§ 29–31; Am. Dig. tit. Contracts, Cent. Ed. Vol. 11, §§ 10–20; Dec. Ed. Vol. 5, § 9.

land; yet the party could recover back the money he had paid in an action." [1]

§ 65. **Same: Engagements of honor distinguished.** — The cases considered in the preceding section should be distinguished carefully from those in which the form or character of the promise leads to the conclusion that the plaintiff did not rely upon it as a contractual obligation but trusted the fairness and liberality of the defendant. In the latter there is not only no contract, but no misreliance upon a supposed contract, and consequently no legal obligation whatever. Thus, where the plaintiff rendered services under an agreement that such compensation would be made "as shall be deemed right," Lord ELLENBOROUGH said: "This was throwing himself upon the mercy of those with whom he contracted," and BAYLEY, J., added: "it was to be in the breast of the committee [the defendants] whether he was to have anything, and if anything then how much." [2]

§ 66. (D) **Required form wanting.** — It is essential to the validity of certain contracts that they be executed in a partic-

[1] Also: *In re* Vince, [1892] 2 Q. B. 478, (money lent in reliance upon a contract void for vagueness); Wyman *v.* Passmore, 1910, 146 Ia. 486; 125 N. W. 213; 27 L. R. A. (N. S.) 683, (services rendered under an agreement to pay proportion of the expense of caring for one's mother); Stout *v.* Carruthersville Hardware Co., 1908, 131 Mo. App. 520; 110 S. W. 619, 620–621, (goods sold under a contract that "the price charged would be as cheap as they could be bought anywhere"); Buckley *v.* Wood, 1902, 67 N. J. L. 583; 52 Atl. 564, (earnest money paid in reliance upon a contract for the purchase of land void for uncertainty); Jacobson *v.* Le Grange, 1808, 3 Johns. (N. Y.) 199, (services rendered under a promise "to do by him as his own child"); Bluemner *v.* Garvin, 1907, 120 App. Div. 29; 104 N. Y. Supp. 1009, (services rendered in reliance upon a contract to give "plaintiff a fair share of defendant's commissions."); Garr *v.* Cranney, 1902, 25 Utah 193; 70 Pac. 853, 855, (services rendered in reliance upon a promise "to pay her for all she had ever done or would do for him"); Buck *v.* Pond, 1905, 126 Wis. 382; 105 N. W. 909, (services rendered in reliance upon a contract for the sale of land, too indefinite to be enforced). But see Leslie *v.* Smith, 1875, 32 Mich. 64, (improvements made in reliance on indefinite contract to convey land).

[2] Taylor *v.* Brewer, 1813, 1 Maul. & S. 290, 291. See also Henderson Bridge Co. *v.* McGrath, 1890, 134 U. S. 260; 10 S. Ct. 730; Kirksey *v.* Kirksey, 1845, 8 Ala. 131; Erwin *v.* Erwin, 1854, 25 Ala. 236.

ular manner or with prescribed formalities.[1] Thus it is sometimes required by statute that certain contracts of municipal corporations shall be entered into only upon sealed bids or proposals made in compliance with duly authorized notice.[2] A failure to comply with the statutory provisions invalidates the contract. But if services have been rendered or materials supplied in misreliance upon it, the contractor may seek to recover the value thereof. The case is so closely related to that of a benefit conferred upon a corporation under a contract *ultra vires* in its nature that they will be treated together in another chapter (*post*, § 154 *et seq.*).

Another formality, the omission of which frequently makes contractual rights unavailable, is that of a writing or written memorandum required by the Statute of Frauds. The English statute does not make a writing essential to the validity of contracts within its purview, but merely provides that they shall be proved by written evidence.[3] In other words the statute establishes a rule of remedial law only, which is exclusively for the benefit of the parties to the contract, and the effect of which is determinable by the *lex fori* rather than the *lex loci contractus*.[4] In some of the United States the courts have felt compelled by express legislative declarations to hold that a failure to comply with the requirements of the statute makes a contract void.[5] But in most of the States the contract is held not to be void but merely unenforceable.[6] Unenforcea-

[1] McCaulley *v.* Jenney, 1875, 5 Houst (Del.) 32, (omission of corporate seal).

[2] Zottman *v.* San Francisco, 1862, 20 Cal. 96; 81 Am. Dec. 96; McDonald *v.* Mayor, 1876, 68 N. Y. 23; 23 Am. Rep. 144.

[3] Britain *v.* Rossiter, 1879, 11 Q. B. D. 123; Maddison *v.* Alderson, 1883, 8 A. C. 467, 488.

[4] Leroux *v.* Brown, 1852, 12 C. B. 801.

[5] Feeney *v.* Howard, 1889, 79 Cal. 525; 21 Pac. 984; 12 Am. St. Rep. 162; 4 L. R. A. 826; Raub *v.* Smith, 1886, 61 Mich. 543; 28 N. W. 676; 1 Am. St. Rep. 619; Dung *v.* Parker, 1873, 52 N. Y. 494; Madigan *v.* Walsh, 1868, 22 Wis. 501.

[6] Shakespeare *v.* Alba, 1884, 76 Ala. 351; Obear *v.* First Nat. Bank, 1895, 97 Ga. 587; 25 S. E. 335; 33 L. R. A. 384; Wheeler *v.* Frankenthal, 1875, 78 Ill. 124; Schierman *v.* Beckett, 1882, 88 Ind. 52; Bird *v.* Munroe, 1877, 66 Me. 337; 22 Am. Rep. 571; Amsinck *v.* Amer. Ins.

bility for lack of admissible evidence is very different from invalidity, and the quasi contractual obligation which may grow out of contracts within the Statute of Frauds will therefore be separately considered (*post*, § 93 *et seq.*).

§ 67. (E) **Contractual capacity wanting.** — A contract possessing all the internal elements of validity may be invalidated by the fact that one of the parties thereto is regarded by the law as incompetent to contract. If either party, however, in the honest belief that the contract is binding, performs it in whole or in part, a benefit resulting to the other party therefrom is a benefit conferred in misreliance upon a non-existent contract right. Assuming that the other elements of quasi contractual obligation are present, such a benefit should be restored.

§ 68. **Same**: (1) **Married women.** — Chiefly as a result of the notion that the wife's personality was merged in that of her husband, a married woman under the common law was in general without contractual capacity.[1] In equity, however, she was permitted to make a contract binding upon her separate equitable estate,[2] and in recent times her contractual disability has been almost entirely removed by legislation.[3] Out of attempts to enter into contracts which, in a particular jurisdiction, she is not permitted to make, the quasi contractual obligation to make restitution may arise.[4]

Co., 1880, 129 Mass. 185; Heaton *v.* Eldridge, 1897, 56 Ohio St. 87; 46 N. E. 638; 36 L. R. A. 817; 60 Am. St. Rep. 737. For additional cases, see 29 Am. & Eng. Ency. of Law (2d ed.) 814 n.

As to what law determines the effect of the statute there is a decided conflict among the American cases. See note to Wolf *v.* Burke, 19 L. R. A. 792, and note to Third Nat. Bank *v.* Steel, 64 L. R. A. 119.

[1] Loyd *v.* Lee, 1718, 1 Str. 94; Marshall *v.* Rutton, 1800, 8 Term R. 545; Foster *v.* Wilcox, 1873, 10 R. I. 443; 14 Am. Rep. 698.

[2] *In re* Leeds Banking Co., 1866, L. R. 3 Eq. 781; Pike *v.* Fitzgibbon, 1881, 17 Ch. Div. 454; Jacques *v.* Methodist Episcopal Church, 1820, 17 Johns. (N. Y.) 548.

[3] See 15 Am. & Eng. Ency. of Law (2d ed.) 792.

[4] Shearer *v.* Fowler, 1810, 7 Mass. 31, (deed void). And see Wilson *v.* Mullins, 1909, Ky. ; 119 S. W. 1180, 1184; Nat. Granite Bank *v.* Tyndale, 1900, 176 Mass. 547; 57 N. E. 1022; 51 L. R. A. 447, (note to husband void). But see Muller *v.* Witte, 1906, 78 Conn. 495; 62 Atl. 756.

In a Massachusetts case it was held that an action for money had and received would not lie against the estate of a deceased husband for the recovery of money received by him from his wife upon his promise to return it, or a like sum, to her:

Kneil v. *Egleston*, 1885, 140 Mass. 202; 4 N. E. 573: DEVENS, J. (p. 204): "It has, indeed, been held that, where one renders service or conveys property as the stipulated consideration of a contract within the statute of frauds, if the other party refuses to perform and sets up the statute, the value of such service or property may be recovered. The obligation which would arise from the receipt or retention of value to return or pay for the same is not overridden, because the words of a form of a contract which did not bind the party repudiating it were uttered at the time. Between parties competent to contract, it is reasonable to infer that the party failing to perform that which he had agreed to do, and yet which he might lawfully do, promised that, if he availed himself of his right of rescission, he would return that which he received, and that the value received or retained by him was so received only on these terms. In *Bacon* v. *Parker* [137 Mass. 309], the parties were competent to contract with each other; but the inference that, if one contract was repudiated, another must be inferred, could not arise where parties were not competent to make any contract."

The conclusion of the learned court in this case appears to rest upon a misapprehension of the nature of quasi contractual obligation. It admits that one who renders services or conveys land under a contract unenforceable because of the Statute of Frauds may recover the value of such services or property, but distinguishes that case from the one at bar by pointing out that in the former the obligation results from an implied promise by the defendant "that if he availed himself of his right of rescission, he would return that which he received," while in the latter no such contract can be implied because the parties are incompetent. As a matter of fact, the obligation in both cases rests not upon a genuine implied promise but upon the rule of law that benefits conferred in mistaken reliance upon an unavailable contract right are under certain circumstances

recoverable. The so-called promise is a fictional one, for procedural purposes only, and the question of the contractual competency of the defendant is irrelevant.

If an action to recover a benefit conferred under a contract between husband and wife were brought by and against the original parties, it might be contended that, regardless of their substantive rights, they cannot sue each other. Such was the rule at common law, and in some jurisdictions it has not been abrogated. But it is noticeable that in *Kneil* v. *Egleston* both husband and wife were dead, and the issue arose between their representatives, so that even the procedural objection was unavailable.[1]

§ 69. **Same**: (2) **Infants.** — In England, at the common law, an infant's contract is binding upon him if it is for his benefit.[2] This is also the law in Rhode Island;[3] but the general rule in America is that an infant's contract is voidable by him whether beneficial or detrimental.[4] Voidability should be distinguished, however, from voidness or invalidity. A void contract, accurately speaking, is not a contract, it is a legal nullity *ab initio*. A voidable contract is one which, by reason of some fact tending to prevent one of the parties from acting with due regard to his interest in making it,[5] may be abrogated by him, but which until and unless it is abrogated subsists as a valid legal obligation. If infants lacked contractual capacity, as is frequently supposed, their contracts, like those of married women under the common law, would be void. As a matter

[1] For further comment on this case, see Keener, "Quasi-Contracts," pp. 336–40.

[2] Clements *v.* London, etc., R. Co., [1894] 2 Q. B. 482; Stephens *v.* Dudbridge Ironworks Co., [1904] 2 K. B. 225. The common law rule has been largely altered by statute. See the Infants Relief Act, 1874, (37 & 38 Vict. c. 62).

[3] Pardey *v.* American Ship Windlass Co., 1897, 20 R. I. 147; 37 Atl. 706; 78 Am. St. Rep. 844.

[4] Cole *v.* Pennoyer, 1852, 14 Ill. 158; Fetrow *v.* Wiseman, 1872, 40 Ind. 148; Lemmon *v.* Beeman, 1888, 45 Ohio St. 505; 15 N. E. 476. For a collection of authorities, see 22 Cyc. 581, 582. For an exhaustive note, see 18 Am. St. Rep. 573.

[5] Harriman, "Contracts," § 399.

of fact, and as is evidenced by their right to enforce their contracts if they choose, they have *legal capacity;* and it is by reason of a presumed *mental incapacity* to safeguard their own interests that they are permitted to escape by avoidance the consequences of their engagements. It follows: first, that any quasi contractual obligation which may rest upon one by reason of his own avoidance of a contract on the ground of infancy is an obligation to restore a benefit conferred in misreliance, not upon a void contract, but upon a contract unavailable because of avoidance; second, that any quasi contractual obligation that may rest upon one by reason of another's avoidance of a contract with him on the ground of infancy is an obligation to restore a benefit obtained by what may be termed a constructive fraud. Both of these obligations — *i.e.* that of the person who avoids and that of the other party — are fully treated in works on Persons and Domestic Relations and require no separate or extended consideration in this book. For the sake of convenience the law may be briefly summarized as follows:

By the weight of authority an infant is not required to return the consideration received by him as a condition precedent to the avoidance of his obligation under a contract and the pleading of infancy in an action against him to enforce it.[1] If, at the time of disaffirmance, however, he retains the consideration, he becomes liable to restore it,[2] and such restoration is a condition precedent to the right to restitution from the other party.[3] Indeed, in the case of the purchase of personal property by an infant, it is held that the title re-vests upon his disaffirmance

[1] Shipley *v.* Smith, 1904, 162 Ind. 526; 70 N. E. 803; Chandler *v.* Simmons, 1867, 97 Mass. 508; 93 Am. Dec. 117; Craighead *v.* Wells, 1855, 21 Mo. 404; Tiffany, "Persons," (2d ed.) § 214. And see Simpson *v.* Prudential Ins. Co. 1903, 184 Mass. 348; 68 N. E. 673; 63 L. R. A. 741; 100 Am. St. Rep. 560.

[2] Strain *v.* Wright, 1849, 7 Ga. 568; Price *v.* Furman, 1855, 27 Vt. 268; 65 Am. Dec. 194; Tiffany, "Persons," (2d ed.) § 215.

[3] MacGreal *v.* Taylor, 1897, 167 U. S. 688; 17 S. Ct. 961; Johnson *v.* Northwestern Mut. Life Ins. Co., 1894, 56 Minn. 365; 57 N. W. 934; 59 N. W. 992; 26 L. R. A. 187; 45 Am. St. Rep. 473; Lemmon *v.* Beeman, 1888, 45 Ohio St. 505; 15 N. E. 476.

and that replevin may be maintained to recover it.[1] On the other hand, if, at the time of disaffirmance, the infant has wasted or disposed of the consideration, he is not required to make restitution in value,[2] the theory being that to compel restitution in such a case would be to deprive the infant of the protection which it is the policy of the law to afford him.

§ 70. **Same**: (3) **Lunatics, drunkards, and spendthrifts.** — One who in a proper proceeding has been judicially declared to be a lunatic, drunkard, or spendthrift, and placed under a guardianship, is thereby deprived of his legal capacity to contract.[3] The quasi contractual obligation resulting from a con-

[1] Strain *v.* Wright, 1849, 7 Ga. 568; Badger *v.* Phinney, 1819, 15 Mass. 359; 8 Am. Dec. 105.

[2] Boody *v.* McKenney, 1844, 23 Me. 517, 525; Nielson *v.* International Text Book Co., 1909, 106 Me. 104; 75 Atl. 330; Brawner *v.* Franklin, 1846, 4 Gill (Md.) 463; Chandler *v.* Simmons, 1867, 97 Mass. 508; 93 Am. Dec. 117; Miller *v.* Smith, 1879, 26 Minn. 248; 2 N. W. 942; Lake *v.* Perry, 1909, 95 Miss. 550; 49 So. 569, 570–73. In some cases it has been held that unless the infant can and does restore the consideration he has received, he has no right, in the absence of fraud, to restitution from the other party: Holmes *v.* Blogg, 1818, 8 Taunt. 508; Adams *v.* Beall, 1887, 67 Md. 53; 8 Atl. 664; 1 Am. St. Rep. 379; Johnson *v.* Northwestern Mut. Life Ins. Co., 1894, 56 Minn. 365; 57 N. W. 934; 59 N. W. 992; 26 L. R. A. 187; 45 Am. St. Rep. 473; Heath *v.* Stevens, 1869, 48 N. H. 251; Holden Taft & Co. *v.* Lineville Pike, 1842, 14 Vt. 405; 39 Am. Dec. 228; *cf.* Price *v.* Furman, 1855, 27 Vt. 268; 65 Am. Dec. 194. But the weight of authority is to the contrary: Manning *v.* Johnson, 1855, 26 Ala. 446; 62 Am. Dec. 732; Reynolds *v.* McCurry, 1881, 100 Ill. 356; Shirk *v.* Shultz, 1887, 113 Ind. 571; 15 N. E. 12; Morse *v.* Ely, 1891, 154 Mass. 458; 28 N. E. 577; 26 Am. St. Rep. 263; Harvey *v.* Briggs, 1890, 68 Miss. 60; 8 So. 274; 10 L. R. A. 62; Lacy *v.* Pixler, 1894, 120 Mo. 383; 25 S. W. 206; Englebert *v.* Troxell, 1894, 40 Neb. 195; 58 N. W. 852; 26 L. R. A. 177; 42 Am. St. Rep. 665; Green v. Green, 1877, 69 N. Y. 553; 25 Am. Rep. 233; Lemmon *v.* Beeman, 1888, 45 Ohio St. 505; 15 N. E. 476.

[3] Bradbury *v.* Place, 1887, (Me.), 10 Atl. 461; Rannells *v.* Gerner, 1883, 80 Mo. 474, (insane); Wadsworth *v.* Sharpsteen, 1853, 8 N. Y 388; 59 Am. Dec. 499, (drunkard). And see Wait *v.* Maxwell, 1827, 5 Pick. (Mass.) 217; 16 Am. Dec. 391, (insane). In some States it is held that an adjudication merely raises a presumption of incapacity to contract which may be rebutted. See Mott *v.* Mott, 1891, 49 N. J. Eq. 192; 22 Atl. 997, (insane); *In re* Gangwere's Estate, 1856, 14 Pa. St. 417; 53 Am. Dec. 554, (insane).

tract thereafter attempted to be entered into by him, is therefore governed by the considerations set forth in this chapter.

Without the adjudication above referred to, insanity or intoxication, according to the better view, does not affect legal capacity to contract. If it is such as results in mental incapacity to form a rational estimate of the legal consequences of his act, the insane or drunken person or his representative, like the infant, may be permitted to avoid the contract.[1] But, differing from the case of an infant, he is required, as a rule, to place the other party *in statu quo* as a condition precedent to avoidance.[2] If the other party knew of the mental condition of the incompetent, the latter may avoid the contract, though he has disposed of the consideration:[3] and in a few jurisdictions an incompetent who has disposed of the consideration may avoid even as against a person who dealt with him in ignorance of his condition.[4] In neither of these cases, it seems, may restitution in value be enforced.

§ 71. **Same**: (4) **Corporations.** — It is one view of *ultra vires* contracts that they are void because of a corporation's legal incapacity to make them, just as a married woman's contracts were void at the common law. They are more properly regarded, however, as illegal rather than as void for want of capacity, and quasi contractual obligations resulting from them are considered in another chapter (*post*, § 154 *et seq.*).

§ 72. (F) **Authority of agent wanting.** — A contract entered

[1] See Tiffany, "Persons," (2d ed.) § 230 and cases cited; Wald's Pollock, "Contracts," (Williston's ed.) p. 93 and American cases collected in note.

[2] Coburn *v.* Raymond, 1904, 76 Conn. 484; 57 Atl. 116; 100 Am. St. Rep. 1000; Scanlan *v.* Cobb, 1877, 85 Ill. 296; Fay *v.* Burditt, 1882, 81 Ind. 433; 42 Am. Rep. 142; Gribben *v.* Maxwell, 1885, 34 Kan. 8; 7 Pac. 584; 55 Am. Rep. 233; Young *v.* Stevens, 1868, 48 N. H. 133; 2 Am. Rep. 202; 97 Am. Dec. 592; Eaton *v.* Eaton, 1874, 37 N. J. L. 108; 18 Am. Rep. 716; Tiffany, "Persons," (2d ed.) § 233.

[3] See cases cited in note 2.

[4] Nichol *v.* Thomas, 1876, 53 Ind. 42; Hovey *v.* Hobson, 1866, 53 Me. 451; 89 Am. Dec. 705; Gibson *v.* Soper, 1856, 6 Gray (Mass.) 279; 66 Am. Dec. 414; Crawford *v.* Scovell, 1880, 94 Pa. St. 48; 39 Am. Rep. 766; Williams *v.* Sapieha, 1901, 94 Tex. 430; 61 S. W. 115, 118; Tiffany, "Persons," (2d ed.) § 233.

into with one who is believed to be the authorized agent of another, but who in reality has no authority to act in the premises, is void. The promise which is supposed to be made by the principal through the instrumentality of his agent is wanting. If the agent has been held out as possessing the authority to make the contract, the principal may be liable under the doctrine of estoppel.[1] But if the agent has neither actual nor implied authority, a benefit conferred upon the supposed principal in the course of the performance is a benefit conferred in reliance upon a right which does not exist. It is true that by a subsequent ratification of the agent's promise the principal may make himself contractually liable;[2] and the acceptance of the benefit of the other party's performance, with full knowledge of the circumstances, may be regarded as an implied ratification.[3] But if the benefit is received under circumstances falling short of ratification, the principal should be required, upon quasi contractual principles, to make restitution.

A recovery, either at law or in equity, has frequently been allowed:

Evans v. *Garlock*, 1885, 37 Hun (N. Y. Sup. Ct.) 588: Action in the nature of an ejectment. The defendant asks for equitable relief. Rogers, the husband of plaintiff's farm tenant, assuming to have authority to act for the plaintiff, contracted to sell a house and lot to the defendant, who paid part of the purchase money. With $450 of the money so paid Rogers purchased a draft which he sent to plaintiff on account of rent. BRADLEY, J. (p. 591): "The relief in view is equitable in character and the question is, which of the parties is in equity and good conscience entitled to the money? The defendant was wholly governed by misapprehension and mistake of the fact in respect to the authority of Rogers, and parted with the money upon the faith and belief that he legitimately represented the plaintiff, and was his agent in the transaction duly authorized in that behalf. And the plaintiff, on the receipt of it, neither relinquished nor advanced anything which made him the recip-

[1] Huffcut, "Agency," § 102 and cases cited.
[2] Huffcut, "Agency," § 30 and cases cited.
[3] Mechem, "Agency," §148.

ient for value in a legal sense. It would seem to follow that upon well-recognized equitable considerations he may be treated as trustee of the fund in behalf of the defendant, on his refusal to ratify the purpose for which the money was paid by her." [1]

There are several cases, however, which hold that the receipt of a benefit by the principal without a knowledge of all the material facts does not result in obligation. In other words proof of ratification is essential:

Kelley v. *Lindsay*, 1856, 7 Gray (Mass.) 287: DEWEY, J. (p. 290): "If Coffin had no authority to borrow money on the account of the defendant, to expend in his business and to pay his debts, the money advanced for that purpose, though so applied, created no debt against the defendant. No one can thus make himself a creditor of another by the unsolicited payment of his debts: and it is not enough to create a liability that the defendant had the benefit of the money, by reason of its being expended in his business or in the payment of his debts." [2]

Spooner v. *Thompson*, 1876, 48 Vt. 259: REDFIELD, J. (p. 265): "If Cutting borrowed money of the plaintiff on the credit of Mrs. Post, without her authority, and paid a part of it to Holmes & Ross without her *knowledge*, it could give the plaintiff no right of action against her. She could not be made the debtor of the plaintiff without her *consent*. If Cutting borrowed money in her name, without authority, and she had knowledge of the fact, and that the money went into her business, and she had the benefit of it, she thereby adopts the transaction and makes it her own." [3]

[1] Also: Reid *v.* Rigby, [1894] 2 Q. B. 40, (*cf.* Bannatyne *v.* MacIver, [1906] 1 K. B. 103, where it is intimated that there could be no recovery at law); First Nat. Bank *v.* Oberne, 1886, 121 Ill. 25; 7. N. E. 85; Leonard *v.* Burlington, etc., Assn., 1881, 55 Ia. 594; 8 N. W. 463; Billings *v.* Inhabitants of Monmouth, 1881, 72 Me. 174; First Baptist Church *v.* Caughey, 1877, 85 Pa. St. 271; Werre *v.* Northwest Thresher Co., 1911, S. D. ; 131 N. W. 721; Farrand, etc., Co. *v.* Board of Church Extension, 1898, 17 Utah 469; 18 Utah 29; 54 Pac. 818; Black Lick Lumber Co. *v.* Camp Const. Co., 1908, 63 W. Va. 477; 60 S. E. 409, 410.

[2] See, however, Newell *v.* Hadley, 1910, 206 Mass. 335, 343, where it is suggested that equity might have allowed the plaintiff to stand in the shoes of the defendant's creditors.

[3] See also Bohart *v.* Oberne, 1887, 36 Kan. 284; 13 Pac. 388; Baldwin *v.* Burrows, 1872, 47 N. Y. 199.

Otis v. *Inhabitants of Stockton*, 1884, 76 Me. 506: PETERS, J. (p. 507): "Although the question was not so distinctly presented in some of the earlier of this class of cases, it is now well settled that an action for money had and received will not lie against a town for money loaned to its officers upon the supposed credit of the town, but without the authority of the town, although the money be applied to the payment of the debts and liabilities of the town, unless the town make the act valid by its subsequent sanction and consent. If there be no precedent authority for the action of the town officers, it must be affirmatively proved that the town has subsequently approved and ratified their acts. Any other doctrine fails to extend to municipal corporations the privilege and immunities that are accorded by the law to any and all other classes of contracting parties." [1]

The reason given for this conclusion — that to allow a recovery would be to enable one to make another his debtor without his consent — is met with the obvious answer that quasi contractual obligation in general is not dependent upon consent, and so long as the plaintiff's enrichment of the defendant is the result of honest mistake and not of malicious interference with the defendant's affairs, there is no harm in compelling restitution.

§ 73. **Same: Instrument under seal.** — The question considered in the preceding section has occasionally been presented in cases of instruments under seal executed on behalf of a partnership but without the express authority of all the partners. At the earlier common law the authority to seal had to be under seal, but it is said to be now well established, in most of the United States, that a partnership will be bound by a deed executed by one partner on its behalf, provided such execution is supported by either a previous parol authority or a subsequent parol ratification.[2] If neither express authority nor express ratification by all the partners can be established,

[1] Three years before the decision of Otis *v.* Inhabitants of Stockton, the Supreme Court of Maine, in a case of almost identical facts, Billings *v.* Inhabitants of Monmouth, 1881, 72 Me. 174, allowed a recovery.

[2] Parsons, "Partnership," (4th ed.) § 122 n.

the contract is inoperative as a firm engagement, but the firm is liable to the extent of the benefit resulting from the other party's performance:

Van Deusen v. *Blum*, 1836, 18 Pick. (Mass.) 229; 29 Am. Dec. 582: Debt against a partnership upon a contract under seal for building a bridge by the plaintiff, with counts for labor performed and materials furnished. It was held that, although the plaintiffs were not entitled to judgment on the contract because the member of the firm who executed it had no authority to bind the partnership by an instrument under seal, they could recover against the firm on the counts for labor and materials. MORTON, J. (p. 231): "The plaintiffs undertook to execute a contract between themselves and the company [partnership]. But there being no such contract in existence, they are left to resort to their equitable claim for their labor and materials. So far as they benefited the company, the plaintiffs are entitled to recover against them." [1]

In some cases the right to recover has been denied:

Bond v. *Aitkin*, 1843, 6 Watts & S. (Pa.) 165; 40 Am. Dec. 550: Debt on a sealed note alleged to have been executed by John and James Aitkin as partners, with an additional count for money lent. The signature, "John and James Aitkin," and the seal had been attached by John, but the firm had received the benefit of the proceeds. SERGEANT, J. (p. 168): "On the additional count, we think the plaintiff has not shown a right to recover. Where the bond of one of the partners is taken for an antecedent partnership debt, it may be considered either as payment and extinguishment of such debt, or only a collateral security, according to the nature of the transaction and the circumstances attending it. But where there is no antecedent debt, but the bond of one of the partners is taken at the time money is loaned to the partnership, and as the consideration for loaning the money, it can hardly be treated as a

[1] *Accord:* Walsh *v.* Lennon, 1880, 98 Ill. 27; 38 Am. Rep. 75; Daniel *v.* Toney, 1859, 2 Metc. (59 Ky.) 523; Hermanos *v.* Duvigneaud, 1855, 10 La. Ann. 114. And see Moore *v.* Stevens, 1883, 60 Miss. 809, 816; Despatch Line *v.* Bellamy Co., 1841, 12 N. H. 205, 236; 37 Am. Dec. 203.

collateral security. It must be considered as all one transaction, and the bond as the only security contemplated; unless, perhaps, there were strong and positive evidence to show an express agreement to the contrary by all parties. If so, then in this case the bond was the only debt; the plaintiff, if he recover at all, must recover on it, and not on the money counts." [1]

These decisions appear to rest upon the theory that since the contract is binding upon the partner who executes it, and therefore the party dealing with the unauthorized agent actually acquires a *contractual* right against *some one*, no *quasi contractual* right can arise. The conclusion, it is believed, is erroneous. For, while it is true that a contractual right is acquired, it is not the contractual right contemplated or relied upon. The contract is entered into in the belief that a right is thereby acquired against the *partnership*, and the benefit of performance is conferred upon the partnership in reliance upon that belief. A right against one member of the partnership only is an entirely different thing, and may be much less valuable if not entirely worthless. The element of misreliance is just as truly present in such a case as in one in which no contract right whatever is acquired.[2]

[1] *Accord:* Morris *v.* Jones & Spence, 1846, 4 Harr. (Del.) 428; Spear *v.* Gillet, 1830, 1 Dev. Eq. (16 N. C.) 466; Waugh *v.* Carriger, 1826, 1 Yerg. (9 Tenn.) 31. And see Galt *v.* Calland, 1836, 7 Leigh (Va.) 594.

[2] Professor Keener, in criticism of Bond *v.* Aitkin, *supra*, says ("Quasi-Contracts," p 327): "Why should the plaintiff be denied a right in quasi-contract because of the right existing under the law to sue one of a firm, not as a member of the firm, but as an individual, on a contract which was intended by both parties to be a firm contract only, binding the firm as such, and constituting the plaintiff not an individual but a firm creditor? Clearly, as to the plaintiff there has been a failure of consideration, in that he has not received that for which he paid his money. The plaintiff intended to receive from the defendants against whom he brought an action a contract giving him a right to call upon them for an equivalent for that which both in fact received from him. The plaintiff having delivered to the defendants what they desired, why should the defendants, because the plaintiff received a contract unauthorized in form, be allowed to keep without compensation that for which they expected to pay, when they received it. The plaintiff did not intend to treat with the acting partner as an individual simply;

Where the agent who executes the sealed instrument without proper authorization is not one of the principals as well, he is not personally bound unless the instrument contains apt words for that purpose.[1] Neither the principal nor the agent being bound, the instrument is a nullity, and the doctrine of *Bond* v. *Aitkin, supra,* cannot be invoked to prevent a recovery in quasi contract.[2]

§ 74. **Same: Agent's abortive execution of sealed instrument.** — Closely resembling the case of an instrument under seal executed by an agent without formal authority is that of an instrument executed by an agent in such a manner as to defeat its purpose. Thus, the agent may fail to indicate on the face of the instrument that he acts in a representative capacity; or, while evincing representation, he may seal the instrument with his own seal instead of the seal of his principal. In neither case is the principal bound by the instrument; in both, if he receives a benefit conferred in the belief that he is bound, he should pay a reasonable price therefor.[3]

§ 75. **Same: Receipt of benefit by principal.** — Whether or not the plaintiff's performance, especially if it consist in the payment of money, results in a benefit to the defendant is a question likely to arise in cases of contracts entered into with unauthorized agents. When money borrowed by an unau-

and when the plaintiff received a contract which both parties supposed bound the firm, but which in fact did not bind the firm, the fact that the partner signing the firm name is held in law to have made an individual contract, does not change the fact that the plaintiff has not received the obligation for which he contracted, and has not therefore received the equivalent which he intended to exact and thought he was receiving. If the instrument delivered to the plaintiff bound no one, then without question the plaintiff would be allowed to recover in quasi-contract against the firm. Why should the fact that the law gives to him a right which he did not wish to obtain, and of which he does not desire to avail himself, lead to a denial of a similar right in the case under consideration?"

[1] Stetson *v.* Patten, 1823, 2 Greenl. (2 Me.) 358; 11 Am. Dec. 111; Abbey *v.* Chase, 1850, 6 Cush. (Mass.) 54.

[2] See Delius *v.* Cawthorn, 1829, 2 Dev. L. (13 N. C.) 90, 98.

[3] McCaulley *v.* Jenney, 1875, 5 Houst. (Del.) 32; Benham *v.* Emery, 1887, 46 Hun (N. Y. Sup. Ct.) 156. And see Osborne *v.* High Shoals Mining, etc., Co., 1857, 5 Jones' Law (50 N. C.) 177.

thorized agent actually reaches the legal possession of the principal, his receipt of a benefit is unquestionable.[1] Such is the case where it is paid into his bank account or otherwise mingled with his funds.[2] But it has been held that money placed by a city treasurer in a drawer provided by the city for his use in keeping the funds of the city, is not in the legal possession of the city, the treasurer being an independent accounting officer and not a mere agent or servant.[3]

The application of borrowed money to the payment of the principal's debts or business expenses constitutes a benefit to him as clearly as a payment into his hands.[4]

It appears to be thought, on the other hand, that if money so borrowed is neither turned over to the principal nor expended in his interest, the required element of a receipt is wanting and restitution must be denied:

Billings v. *Inhabitants of Monmouth*, 1881, 72 Me. 174: Assumpsit on a note with count for money had and received. The plaintiff loaned money to a town, through its treasurer, taking negotiable notes which the treasurer had no authority to issue. BARROWS, J. (p. 179): "It is the payment of the lawful debts of the town by its own agents with the plaintiff's money which constitutes the cause of action."

First Baptist Church v. *Caughey*, 1877, 85 Pa. St. 271: Assumpsit on a note with indebitatus counts. The plaintiff loaned money to a church, through its trustees, taking negotiable

[1] Evans *v.* Garlock, 1885, 37 Hun (N. Y. Sup. Ct.) 588.

[2] Reid *v.* Rigby, [1894] 2 Q. B. 40; Leonard *v.* Burlington Mutual Loan Assn., 1881, 55 Ia. 594; 8 N. W. 463. But see Fay *v.* Slaughter, 1901, 194 Ill. 157; 62 N. E. 592; 56 L. R. A. 564; 88 Am. St. Rep. 148. In Reid *v.* Rigby, *supra*, it was held the plaintiff's right to recover money borrowed without authority and paid into the defendant's account is not affected by the fact that the money was borrowed by the agent to replace money which he had wrongfully abstracted.

[3] Railroad Nat. Bank *v.* City of Lowell, 1872, 109 Mass. 214.

[4] Reid *v.* Rigby, [1894] 2 Q. B. 40; First Nat. Bank *v.* Oberne, 1886, 121 Ill. 25; 7 N. E. 85; Bicknell *v.* Widner School Township, 1881, 73 Ind. 501; First Nat. Bank *v.* Union School Township, 1881, 75 Ind. 361; Leonard *v.* Burlington Mutual Loan Assn., 1881, 55 Ia. 594; 8 N. W. 463; Billings *v.* Inhabitants of Monmouth, 1881, 72 Me. 174; First Baptist Church *v.* Caughey, 1877, 85 Pa. St. 271.

paper which the trustees were not empowered to issue. GALBRAITH, P.J. (of the trial court, the judgment being affirmed above), (p. 272): "If the jury believe from the evidence that the money for which the note was executed by the trustees was used by them, or by other officers of the church, in rebuilding the church building, and so went to the benefit of the society, then the law raises an implied obligation in equity and good conscience, as well as in law, on the part of the church to repay it, and the verdict should be for the plaintiff. If, on the contrary, the jury believe from the evidence that the money went to pay a debt of W. J. F. Liddell, one of the trustees who signed the note, . . . plaintiff could not recover."

In case the agent receiving the money has *no authority to borrow*, the conclusion that a payment over to the principal or an application in his interest must be shown in order to establish the receipt of a benefit by such principal, is undoubtedly sound.[1] But if an agent is authorized to borrow money for his principal and the promise to repay is void merely because it is in a form in which he is not authorized to make it — as, where the agent has no authority to issue negotiable paper — it would seem that the receipt of the money by the agent is the equivalent of, or in contemplation of law amounts to, a receipt by the principal, that a benefit to the principal thereupon accrues, and that the subsequent disposition of the money by the agent is immaterial.[2]

[1] Thompson *v.* Murphy, 1906, 60 W. Va. 42; 53 S. E. 908; 6 L. R. A. (N. S.) 311. The same is true of money paid on a contract, which the agent is not authorized to receive. See McKiernan *v.* Valleau, 1902, 23 R. I. 501; 51 Atl. 102.

[2] Keener, "Quasi-Contracts," p. 332 (commenting on First Baptist Church *v.* Caughey): "Since there was no excess of authority on the part of the trustees in borrowing money, there seems to be no reason why the loss in the event of a misappropriation should be thrown upon the plaintiff, simply because the trustees, when they borrowed the money, attempted to give the plaintiff a form of obligation which they had not the power to issue. Had the trustees, in the exercise of their authority, simply borrowed the money, and orally bound the corporation to pay the same, it would not be contended that the plaintiff should look to the application of the money; why then should he be required to look to its application simply because he has failed to receive the obligation which he expected?"

§ 76. **Same: Misuse of money by agent.** — Professor Keener contends that where money is borrowed by an agent having no authority to borrow, and is made a part of the funds of the principal, *and then misused* by the agent, the lender is not entitled to restitution:

Keener on "Quasi-Contracts," p. 334, in discussing *Billings* v. *Monmouth*:[1] "For while the town [defendant], because of receiving the plaintiff's money, should be put under an obligation to make restitution, that obligation resting on the fact of an unjust enrichment on the part of the town, a loss arising from the misuse of the money without any fault on the part of the town, should, it is submitted, fall on the plaintiff. . . . It would be unjust, therefore, to hold the town responsible for money put into its treasury without its authority and without its knowledge, and from which it had derived no benefit."

The learned author has the support of the Supreme Court of Illinois:

Fay v. *Slaughter*, 1902, 194 Ill. 157; 62 N. E. 592; 56 L. R. A. 564; 88 Am. St. Rep. 148: Action for money had and received. The defendant's agent, who had a power of attorney to draw checks on the Northern Trust Co. and to indorse checks for deposit with said company, forged the defendant's name upon an assignment of stock certificates belonging to defendant and transferred them to plaintiffs who were innocent purchasers. In payment the agent received checks to the defendant's order, which he indorsed with defendant's name and deposited with the Northern Trust Co., where they were credited to defendant's account. The agent subsequently drew checks upon the defendant's account in the Trust Company, and appropriated the proceeds. RICKS, J. (p. 170): "We are unable to concur in the view that the mere passing of this money through the bank account of plaintiff in error without authority given by him, and in the absence of evidence showing it went to his benefit or was used by or for him, can be held to be such receiving of the money of the defendants in error by him as in equity and good conscience renders him liable for money had and received

[1] 1881, 72 Me. 174.

for the use of the defendants in error. In this record there is no evidence showing or tending to show, that plaintiff in error got the real benefit of any of this money, either by checking it out for his own use or by its being checked and applied to his business."

This view, it is submitted, is not tenable. It is the *receipt* of a benefit and not the use or enjoyment of it which is essential to quasi contractual obligation. The loss of money, after it has become a part of the funds of the principal, through fire or robbery, would deprive the defendant of its use and enjoyment, but would hardly enable him to deny that a benefit had been received by him.[1] That it is lost through the misconduct of the same agent who added it to his funds is immaterial.

§ 77. **Same: Receipt of benefit by agent: Smout v. Ilbery.** — It is the general rule that one who purports to contract as the agent of another impliedly warrants his authority, and therefore may be held for breach of warranty if the assumed authority is wanting.[2] Where, however, the agent in good faith discloses all of the facts touching the question of his authority in order that the person with whom he deals may judge for himself as to the existence or extent of such authority, no warranty is implied.[3] If, in such a case, the agent receives a benefit from the performance of the other party and instead of turning it over to his principal retains it himself, is he responsible, quasi contractually, for its value? The answer must be in the negative, for the very circumstances that disprove the existence of an implied warranty show that the person with whom the agent dealt assumed the risk that he was without authority and therefore cannot be said to have conferred the benefit in misreliance upon a supposed right that turned out to be non-existent (*ante*, § 16).

[1] See *ante*, § 30 as to effect of loss or theft of identical thing received by defendant.

[2] Mechem, "Agency," §§ 544, 545; Huffcut, "Agency," § 183 and cases cited.

[3] Mechem, "Agency," § 546; Huffcut, "Agency," § 183 and cases cited.

In the English case of *Smout* v. *Ilbery*,[1] decided in 1842, it was held that the defendant, whose husband had left England for China, was not liable to the plaintiff, a butcher, for meat purchased by her as the agent of her husband after the death of the husband but before information of his death was received. This decision has been criticised,[2] but reasonably interpreted it commands respect. In the first place it should be remembered that in 1842 the doctrine of the agent's liability for breach of warranty, as distinguished from his liability in deceit, had not been fully developed.[3] And in the second place it is a reasonable inference that there was in fact no implied representation of authority. As was said in a recent judicial discussion of the case:[4] " The husband had left England for China in May, 1839, a time in the history of the world when communication was not what it is now, and the Court seems to have decided upon the ground that the butcher who supplied the goods knew that the facts were such that the wife did not, because she could not, take upon herself to affirm that he was alive. If so, there was no implied contract." But whether or not this was the true *ratio decidendi*, it seems clear that if the case were to arise to-day, it would be held, either (1) that upon a proper interpretation of the facts there was an implied warranty of authority, or (2) that credit was given to the wife as principal, or (3) that there being no warranty of authority and credit not having been given to the wife as principal, the plaintiff " took a chance " that he was acquiring no contract right to compensation for the goods furnished, and therefore is not entitled, upon the theory of misreliance, to restitution.

§ 78. **Same: Restitution against public policy: Benefit conferred upon municipal corporations.** — Special considerations of public policy have led the courts to refuse to allow a recovery in quasi contract in many instances of benefits conferred upon municipal corporations under void or illegal contracts. The

[1] 10 Mees. & Wels. 1.
[2] See Keener, "Quasi-Contracts," pp. 334–6.
[3] See Collen *v.* Wright, 1857, 8 El. & Bl. 647.
[4] Younge *v.* Toynbee, [1910] 1 K. B. 215, 228.

various cases, including those of benefits conferred under contracts void for want of authority in the agent professing to act for the municipality, are discussed in the chapter on *ultra vires* contracts of corporations (*post*, § 161).

§ 79. **Same: Form of action against principal.** — Where money paid to an unauthorized agent is turned over to the principal or mingled with his funds, it is clear that an action for money had and received will lie against the principal.[1] Where the agent receiving the money is authorized to borrow, and the invalidity of the contract results merely from its unauthorized form, the receipt by the agent amounts in legal contemplation to a receipt by the principal (*ante*, § 75), and consequently should support an action for money had and received against the principal, whatever disposition of the money is subsequently made by the agent. Where the agent receiving the money is not authorized to borrow, and instead of paying it over to the principal or mingling it with his funds, applies it to the satisfaction of debts of the principal, the count for money had and received is unavailable against the principal. It would seem, however, that an action for money paid to the defendant's use should be sustained.[2] Moreover, the circumstances would seem to justify the subrogation of the plaintiff to the rights of the creditors of the principal upon whose claims the money was applied.[3]

[1] Reid *v.* Rigby, [1894] 2 Q. B. 40; Leonard *v.* Burlington Mutual Loan Assn., 1881, 55 Ia. 594; 8 N. W. 463.

[2] See Reid *v.* Rigby, [1894] 2 Q. B. 40, opinion of Collins, J.; Bicknell *v.* Widner School Township, 1881, 73 Ind. 501, 505.

[3] White River School Township *v.* Dorrell, 1901, 26 Ind. App. 538; 59 N. E. 867.

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CHAPTER V

MISRELIANCE ON NON-EXISTENT OR INVALID CONTRACT (*continued*): ALTERED OR FORGED NEGOTIABLE INSTRUMENTS

§ 80. (I) Mistake by drawee as to genuineness of body of instrument or of signature of drawer or indorser.
§ 81. Same: Why is restitution denied where drawer's signature is forged?
§ 82. (1) The conclusive presumption theory.
§ 83. (2) The negligence theory.
§ 84. (3) The equal equities theory.
§ 85. (4) The change of position theory.
§ 86. (5) The theory that there is no mistake as to drawer's duty to holder.
§ 87. (6) The theory that the rule is one of policy.
§ 88. (7) The rule criticized.
§ 89. (II) Mistake by payor for honor as to genuineness of drawer's signature.
§ 90. (III) Mistake as to genuineness of payor's signature.
§ 91. (IV) Mistake as to genuineness of bill of lading attached to draft.
§ 92. (V) Effect of negligence.

§ 80. (I) **Mistake by drawee as to genuineness of body of instrument or of signature of drawer or indorser.** — It appears to be well settled that money paid by the drawee of a negotiable instrument to the holder, under a mistake as to the genuineness of the *body* of the instrument,[1] or of the signature of an *in-*

[1] Espy *v.* Bank of Cincinnati, 1873, 18 Wall. (U. S.) 604; Redington *v.* Woods, 1873, 45 Cal. 406; 13 Am. Rep. 190; Parke *v.* Roser, 1879, 67 Ind. 500; 33 Am. Rep. 102; Third Nat. Bank *v.* Allen, 1875, 59 Mo. 310; Bank of Commerce *v.* Union Bank, 1850, 3 N. Y. 230; Nat. Bank of Commerce *v.* Nat. M. B. Assn., 1873, 55 N. Y. 211; 14 Am. Rep. 232; Marine Nat. Bank *v.* Nat. City Bank, 1874, 59 N. Y. 67; 17 Am. Rep. 305; White *v.* Continental Nat. Bank, 1876, 64 N. Y. 316; 21 Am. Rep. 612; Security Bank *v.* Nat. Bank of Republic, 1876, 67 N. Y. 458; 23 Am. Rep. 129; Clews *v.* N. Y. Nat. Banking Assn., 1882, 89 N. Y. 418; 42 Am. Rep. 303; City Bank *v.* First Nat. Bank, 1876, 45 Tex. 203. And see Imperial Bank *v.* Bank of Hamilton, [1903]

dorser,[1] is recoverable. On the other hand, it is held in most jurisdictions that the drawee cannot recover money paid under a mistake as to the genuineness of the *drawer's* signature.[2]

A. C. 49. But see Crocker-Woolworth Nat. Bank *v.* Nevada Bank, 1903, 139 Cal. 564; 73 Pac. 456; 63 L. R. A. 245; 96 Am. St. Rep. 169. Professor Ames called attention to the fact that in continental Europe the holder need not refund. See 4 Harv. Law Rev. 297, 306, citing 1 Nouguier, "Lettre de Change" (4th ed.), § 325; 2 Pardessus, "Cours de Droit Commercial" (3d ed.), § 506; Wächter, "Wechselrecht," 481.

[1] Espy *v.* Bank of Cincinnati, 1873, 18 Wall. (U. S.) 604; United States *v.* Nat. Exch. Bank, 1909, 214 U. S. 302; 29 S. Ct. 665, (pension check); La Fayette & Bro. *v.* Merchants' Bank, 1905, 73 Ark. 561; 84 S. W. 700; 68 L. R. A. 231; 108 Am. St. Rep. 71; Mills *v.* Barney, 1863, 22 Cal. 240, (certificate of deposit); Bartlett *v.* First Nat. Bank, 1910, 247 Ill. 490; 93 N. E. 337; Cochran *v.* Atchison, 1882, 27 Kan. 728; Wellington Nat. Bank *v.* Robbins, 1905, 71 Kan. 748; 81 Pac. 487; 114 Am. St. Rep. 523; McCall *v.* Corning, 1848, 3 La. Ann. 409; 48 Am. Dec. 454; Carpenter *v.* Northborough Nat. Bank, 1877, 123 Mass. 66; First Nat. Bank *v.* City Nat. Bank, 1902, 182 Mass. 130; 65 N. E. 24; 94 Am. St. Rep. 637; Third Nat. Bank *v.* Allen, 1875, 59 Mo. 310; First Nat. Bank *v.* Farmers' & Merchants' Bank, 1898, 56 Neb. 149; 76 N. W. 430; Star Fire Ins. Co. *v.* N. H. Nat. Bank, 1881, 60 N. H. 442; Canal Bank *v.* Bank of Albany, 1841, 1 Hill (N. Y.) 287; Holt *v.* Ross, 1873, 54 N. Y. 472; 13 Am. Rep. 615; Corn Exch. Bank *v.* Nassau Bank, 1883, 91 N. Y. 74; 43 Am. Rep. 655; Ryan *v.* Bank of Montreal, 1886, 12 Ont. 39; Chambers *v.* Union Nat. Bank, 1875, 78 Pa. St. 205. But see London, etc., Bank *v.* Bank of Liverpool, [1896] 1 Q. B. 7.

[2] Price *v.* Neal, 1762, 3 Burr. 1354; Smith *v.* Mercer, 1815, 6 Taunt. 76; Redington *v.* Woods, 1873, 45 Cal. 406; 13 Am. Rep. 190; First Nat. Bank *v.* Ricker, 1874, 71 Ill. 439; 22 Am. Rep. 104; First Nat. Bank *v.* Marshalltown State Bank, 1899, 107 Ia. 327; 77 N. W. 1045; 44 L. R. A. 131; Howard *v.* Mississippi Bank, 1876, 28 La. Ann. 727; 26, Am. Rep. 105, (virtually overruling McKleroy *v.* Southern Bank, 1859, 14 La. Ann. 458; 74 Am. Dec. 438); Commercial, etc., Bank *v.* First Nat. Bank, 1868, 30 Md. 11; 96 Am. Dec. 554; Gloucester Bank *v.* Salem Bank, 1820, 17 Mass. 33; Nat. Bank *v.* Bangs, 1871, 106 Mass. 441; 8 Am. Rep. 349; Bernheimer *v.* Marshall, 1858, 2 Minn. 78; 72 Am. Dec. 79; Pennington County Bank *v.* First State Bank, 1910, 110 Minn. 263; 125 N. W. 119; 136 Am. St. Rep. 496; 26 L. R. A. (N. S.) 849; Stout *v.* Benoist, 1866, 39 Mo. 227; 90 Am. Dec. 466; Weisser *v.* Denison, 1854, 10 N. Y. 68; 61 Am. Dec. 731; Nat. Park Bank *v.* Ninth Nat. Bank, 1871, 46 N. Y. 77; 7 Am. Rep. 310; Frank *v.* Chemical Nat. Bank, 1881, 84 N. Y. 209; 38 Am. Rep. 501; Nat. Bank of Comm. *v.* Grocers' Nat. Bank, 1867, 2 Daly (N. Y. C. P.) 289; Ryan *v.* Bank of Montreal, 1886, 12 Ont. 39; Farmers', etc.,

The right to recover in the former cases is sometimes declared to arise from the implied warranty by the holder that the paper is genuine. Assuming that there is such an implied warranty by the indorser in the case of a *sale* of the paper,[1] presentation and payment can hardly be regarded as a sale.[2] It seems more accurate to say that the right to recover is a quasi contractual right, resting upon the doctrine that one who confers a benefit in misreliance upon a right or duty is entitled to restitution.[3]

§ 81. **Same: Why is restitution denied where drawer's signature is forged?** — Several attempts have been made to explain away the apparent inconsistency of allowing a recovery where an indorsement is forged or the body of the instrument altered, and denying a recovery where the signature of the drawer is forged.

Bank *v.* Bank of Rutherford, 1905, 115 Tenn. 64; 88 S. W. 939; 112 Am. St. Rep. 817; Bank of St. Albans *v.* Farmers' Bank, 1838, 10 Vt. 141; 33 Am. Dec. 188; Johnston *v.* Commercial Bank, 1885, 27 W. Va. 343; 55 Am. Rep. 315. See also Hoffman *v.* Milwaukee Bank, 1870, 12 Wall. (U. S.) 181; Young *v.* Lehman, 1879, 63 Ala. 519; Hardy *v.* Chesapeake Bank, 1879, 51 Md. 562; 34 Am. Rep. 325; First Nat. Bank of Danvers *v.* First Nat. Bank of Salem, 1890, 151 Mass. 280; 24 N. E. 44; 21 Am. St. Rep. 450; Star Fire Ins. C. *v.* N. H. Nat. Bank, 1881, 60 N. H. 442. *Contra:* First Nat. Bank *v.* Bank of Wyndmere, 1906, 15 N. D. 299; 108 N. W. 546; 10 L. R. A. (N. S.) 49; American Express Co. *v.* State Nat. Bank, 1911, 27 Okl. 824; 113 Pac. 711; 33 L. R. A. (N. S.) 188.

The same rule prevails in continental Europe. See Ames, "The Doctrine of Price *v.* Neal," 4 Harv. Law Rev. 297, 298, citing: 2 Pardessus, "Cours de Droit Commercial" (3d ed.), § 501; Wächter, "Wechselrecht," 482.

[1] See Uniform Negotiable Instrument Law, § 116; Norton on "Bills & Notes" (3d ed.), p. 162.

[2] Professor Ames, in 4 Harv. Law Rev. 297, 302, says: "The notion that the holder's indorsement of his name on the bill at the time of payment is a warranty of the genuineness of the bill, although not without judicial sanction [Nat. Bank *v.* Banks, 1871, 106 Mass. 441; 8 Am. Rep. 349; People's Bank *v.* Franklin Bank, 1889, 88 Tenn. 299; 12 S. W. 716; 6 L. R. A. 724; 17 Am. St. Rep. 884], should be strenuously resisted. The so-called indorsement is not an indorsement at all, but simply a receipt of payment." Citing: Wilkinson *v.* Johnson, 1824, 3 Barn. & C. 428, 436; Bernheimer *v.* Marshall, 1858, 2 Minn. 78, 84; 72 Am. Dec. 79; Bank of St. Albans *v.* Farmers' Bank, 1838, 10 Vt. 141, 146–7, 33 Am. Dec. 188.

[3] First Nat. Bank *v.* City Nat. Bank, 1902, 182 Mass. 130; 65 N. E. 24; 94 Am. St. Rep. 637.

The rule permitting a recovery in the former cases is generally conceded to be sound. The leading decision denying the right in the latter case is *Price* v. *Neal*,[1] decided by Lord MANSFIELD in 1762. In that case a drawee-acceptor who paid two bills purporting to be drawn upon him by drawers whose signatures were in fact forged was denied a recovery from an innocent indorsee, to whom he had at maturity paid the bills. There were no special circumstances of negligence on plaintiff's part save such as may be necessarily implied from his failure to recognize the forgery, nor any special estoppel against him and in favor of the defendant other than such as may be inferred from the foregoing facts.

In an effort to support the denial of relief in this and similar cases, several theories have been advanced. They will be considered in the following sections.

§ 82. (1) **The conclusive presumption theory.** — It is commonly said that the drawee is conclusively presumed to know the signature of the drawer, and therefore pays at his peril.

This theory, if it may be so called, is strongly suggested by Lord MANSFIELD in the leading case of *Price* v. *Neal*.[2] "It was incumbent upon the plaintiff," he says, "to be satisfied 'that the bill drawn upon him was the drawer's hand,' before he accepted or paid it; but it was not incumbent on the defendant to inquire into it." It is certainly the favorite explanation of the rule and is reiterated in nearly every judicial opinion bearing upon the question. But it is in reality only another way of stating the rule, rather than an explanation of it. For the question remains: *Why* is he conclusively presumed to know the signature of the drawer? "Why is the drawee's excusable ignorance an irrevelant fact?"[3]

§ 83. (2) **The negligence theory.** — Another explanation that has been offered is that in accepting or paying a bill the signature of the drawer of which is forged, the drawee is chargeable with negligence.

[1] 3 Burr. 1354.
[2] 1762, 3 Burr. 1354, 1357.
[3] Ames, "The Doctrine of Price *v.* Neal," 4 Harv. Law Rev. 297, 299.

This is the theory upon which the defense in the leading case of *Price* v. *Neal* was rested. Mr. Yates, for the defendant, "denied it to be a payment by mistake: and insisted that it was rather owing to the negligence of the plaintiff; who should have inquired and satisfied himself, 'whether the bill was really drawn upon him by Sutton, or not.'" And Lord MANSFIELD, in the course of his opinion, said:[1] "Whatever neglect there was, was on his [plaintiff's] side. The defendant had *actual encouragement* from the plaintiff himself, for negotiating the second bill, from the plaintiff's having without any scruple or hesitation paid the first; and he paid the whole value *bona fide*. . . . in this case, if there was any fault or negligence in any one, it certainly was in the plaintiff, and not in the defendant."

The notion that negligence on the part of the drawee is the basis of liability is suggested, if not relied upon, in a number of cases. The following statement is typical:

Ellis v. *Ohio Life Ins. & Trust Co.*, 1855, 4 Ohio St. 628; 64 Am. Dec. 610: RANNEY, J. (p. 652): "We admit it to be equally well settled, that, where the instrument is drawn upon, or purports to be signed by, the party paying the money, to a holder without fault, and whose situation would be thereby changed, to his prejudice if he were compelled to refund, the money cannot be recovered back. The foundations of the rule are sufficiently obvious. The party is supposed to know his own handwriting, in the one case, or that of his customer or correspondent in the other, much better than the holder can; and the law, therefore, allows the holder to cast upon him the entire responsibility of determining as to the genuineness of the instrument, and if he fails to discover the forgery, imputes to him *negligence*, and, as between him and the innocent holder, compels him to suffer the loss."[2]

[1] Price *v.* Neal, 1762, 3 Burr. 1354, 1357.

[2] See also First Nat. Bank *v.* Ricker, 1874, 71 Ill. 439; 22 Am. Rep. 104; Gloucester Bank *v.* Salem Bank, 1820, 17 Mass. 33; Bernheimer *v.* Marshall, 1858, 2 Minn. 78; 72 Am. Dec. 79; Stout *v.* Benoist, 1866, 39 Mo. 277; 90 Am. Dec. 466; Farmers', etc., Bank *v.* Bank of Rutherford, 1905, 115 Tenn. 64; 88 S. W. 939; 112 Am. St. Rep. 817; Bank of Williamson *v.* McDowell County Bank, 1910, 66 W. Va. 545; 66 S. E. 761.

There are, as Professor Ames has pointed out, two objections to this theory. In the first place, its proper application would require that the plaintiff be permitted to show, by evidence of the skillfulness of the forgery or other exculpatory circumstances, that as a matter of fact he was not negligent. It seems likely, however, that such evidence would ordinarily be excluded. In the case of *Hardy* v. *Chesapeake Bank*,[1] for instance, the court said: "If the bank pays money on a forged check, no matter under what circumstances of caution, or however honest the belief in its genuineness, if the depositor himself be free of blame and has done nothing to mislead the bank, all the loss must be borne by the bank for it acts at its peril." [2] In the second place,

[1] 1879, 51 Md. 562, 585; 34 Am. Rep. 325.

[2] See, however, Cooke *v.* United States, 1875, 91 U. S. 389. Action to recover money paid by the Assistant Treasurer of the United States in New York for the redemption of treasury notes which are now alleged to be counterfeit. WAITE, C.J. (p. 396): "It is, undoubtedly, also true, as a general rule of commercial law, that where one accepts forged paper purporting to be his own, and pays it to a holder for value, he cannot recall the payment. The operative fact in this rule is the acceptance, or more properly, perhaps, the adoption, of the paper as genuine by its apparent maker. Often the bare receipt of the paper accompanied by payment is equivalent to an adoption within the meaning of the rule; because, as every man is presumed to know his own signature, and ought to detect its forgery by simple inspection, the examination which he can give when the demand upon him is made is all that the law considers necessary for his protection. He must repudiate it as soon as he *ought* to have discovered the forgery, otherwise he will be regarded as accepting the paper. Unnecessary delay under such circumstances is unreasonable; and unreasonable delay is negligence, which throws the burden of the loss upon him who is guilty of it, rather than upon one who is not. The rule is thus well stated in Gloucester Bank *v.* Salem Bank, 17 Mass. 45: 'The party receiving such notes must examine them as soon as he has opportunity, and return them immediately: if he does not, he is negligent; and negligence will defeat his action.'

"When, therefore, a party is entitled to something more than a mere inspection of the paper before he can be required to pass finally upon its character, — as, for example, an examination of accounts or records kept by him for the purposes of verification, — negligence sufficient to charge him with a loss cannot be claimed until this examination ought to have been completed. If, in the ordinary course of business, this might have been done before payment, it ought to have been, and payment without it will have the effect of acceptance

to deny a recovery because the plaintiff's mistake appears to have been the result of his negligence, is contrary to the general principle governing the recovery of benefits conferred by mistake, as has elsewhere been shown (*ante*, § 15).

§ 84. (3) **The equal equities theory.** — Professor Ames advanced and very ably supported the view that the drawee is denied a recovery, in case the signature of the drawer is forged, upon the principle that as between parties having equal equities, one of whom must suffer, the legal title should prevail.[1]

"The true principle," he said, "upon which cases like Price *v.* Neal are to be supported, is that far-reaching principle of natural justice, that as between two persons having equal equities, one of whom must suffer, the legal title shall prevail. The holder of the bill of exchange paid away his money when he bought it; the drawee parted with his money when he took up the bill. Each paid in the belief that the bill was genuine. In point of natural justice they are equally meritorious. But the holder has the legal title to the money. A court of equity (and the action of assumpsit for money had and received is, in substance, a bill in equity) cannot properly interfere to compel the holder to surrender his legal advantage. The same reasoning applies if the drawee has merely accepted the bill. The legal title to the acceptance is in the holder. A court of equity ought not to restrain the holder by injunction from enforcing his legal right, nor should a court of law permit the acceptor to defeat his acceptance by an equitable defense."

Professor Ames' theory finds little support in the reasoning of judicial opinions and has been challenged by Professor Keener and Professor Wigmore. The most effective arguments that have been urged against it are substantially as follows:

and adoption. But if the presentation is made at a time when, or at a place where, such an examination cannot be had, time must be allowed for that purpose; and, if the money is then paid, the parties, the one in paying and the other in receiving payment, are to be understood as agreeing that a receipt and payment under such circumstances shall not amount to an adoption, but that further inquiry may be made, and, if the paper is found to be counterfeit, it may be returned within a reasonable time."

[1] "The Doctrine of Price *v.* Neal," 4 Harv. Law Rev. 297, 299.

1. That the doctrine that " where equities are equal the legal title shall prevail " does not apply because the competing equities are not in the same *res*.

2. That if the doctrine is applied to cases of forgery of the drawer's signature, it should also be applied to cases of forged indorsements, in which, however, a recovery is generally permitted.

In support of the first objection, it is pointed out that in all cases to which the application of the doctrine is unquestioned, the equities are in the same *res*. For example, where B and C receive assignments from A of a claim against X, it is clear that each has an equity in the same subject matter — the debt of X. If one, by collecting the debt, acquires a *legal* title, he will not be disturbed. Again, in the case of a contest between the purchaser of land and an equitable incumbrancer, the equity of each is in the same subject matter — the land. He who has the legal title, in addition to his equity, will not be deprived of his advantage. But in the cases under consideration the holder's equity, which arises when he buys the forged instrument, is in the purchase price paid for such instrument, while the drawee's equity, arising in an entirely separate transaction, is in the sum paid to the holder.[1]

Replying to this criticism, the writer of a note in the Harvard Law Review says:[2]

"This criticism of the theory of 'equal equities,' as explaining the doctrine of *Price* v. *Neal*, seems to proceed on a misinterpretation. There are no legal equities involved, in the sense of equitable claims against the same person in respect to the same *res*. The doctrine simply means that, as between parties equally meritorious, a legal title will not be disturbed. Both parties have paid out their money under an innocent mistake as to the same fact; but the holder now has legal title to the money he has received, or, in case the bill has only been accepted, to the obligation to pay. Consequently there is no reason in equity for depriving him of that legal title."

[1] Professor Wigmore, " A Summary of Quasi-Contracts," 25 Am. Law Rev. 695, 706; Keener, "Quasi-Contracts," pp. 154–8.

[2] 16 Harv. Law Rev. 514.

This explanation, it is submitted, does not meet the objection. It is true that the holder and drawee successively pay out their money under a mistake as to the same fact. But there are nevertheless two entirely separate transactions and two quite distinct cases of money paid under mistake. If the holder's mistake followed the drawee's and would not occur but for the drawee's, it might be successfully contended that, since the holder changes his position as a result of the drawee's act, justice would not be served by permitting the drawee to recover at the holder's expense (see *ante*, § 25). But the holder's mistake precedes the drawee's and cannot possibly be said to result from any act or omission of the drawee. It is the holder's own calamity, for which the drawee is in no way responsible, and affords no reason for denying to the drawee the right to recover money innocently paid by him, in a subsequent transaction, to the holder. To deny relief to the drawee "is in effect to allow the defendant to recoup his loss at the expense of the plaintiff," [1] under circumstances which, in the absence of considerations of policy, do not warrant such a recoupment.

The second objection was anticipated by Professor Ames with the contention that the cases permitting a recovery of money paid under mistake as to the genuineness of an *indorsement* rest upon the doctrine of subrogation. He said: [2]

"Here, too, it may be urged, the equities are equal, and the holder, having obtained the money, should keep it. But this case differs in an important particular from all the cases hitherto considered, and another principle comes into play, which overrides the rule as to equal equities. In all the other cases the bill or note, however valueless it may have been, belonged to the holder. In the case of the forged indorsement, on the other hand, the bill or note belongs, not to the holder,

[1] Keener, "Quasi-Contracts," p. 156.

[2] 4 Harv. Law Rev. 307. See Title Guarantee and Trust Co. *v.* Haven, 1909, 196 N. Y. 487; 89 N. E. 1082; 25 L. R. A. (N. S.) 1308, a case where drawee (drawer's name being forged) was subrogated to assessment lien which had been terminated by payment of check.

but to him whose name was forged as indorser. The holder, who bought the bill, was therefore guilty of a conversion, however honestly he may have acted. When he collected the bill, inasmuch as he obtained the money by means of the true owner's property, he became a constructive trustee of the money for the benefit of the latter. The true owner may therefore recover the money as money had and received to his use. If he recovers in his action, the property in the bill would pass to the holder; but the bill would be of no value to him, for, if he should seek to collect it, he would be met with the defense that it had been paid to him once already. If, on the other hand, the true owner prefers to proceed on the bill against the maker or acceptor, he may do so, and the prior payment to the holder, being made to one without title, will be no bar to the action. The maker or acceptor, however, who pays to the true owner, is entitled to the bill, and should be subrogated to the owner's right to enforce the constructive trust against the holder, and could thereby make himself whole. Consequently, whatever course the true owner elects to pursue, the loss must ultimately fall on the holder."

This theory, like that which is called to the support of *Price* v. *Neal*, has little recognition in the adjudged cases. And it involves a straining of the doctrine of subrogation, since the drawee is permitted to sue in his own name, and without showing payment to the true owner of the bill. An analogy, however, may be conceded.

§ 85. (4) **The change of position theory.** — Another suggested reason for denying relief is that in consequence of the drawee's payment of the bill, the holder loses the right of recourse against prior indorsers which the dishonor of the bill would have given him. That is, as a result of the drawee's mistake the holder's position is so altered that to permit a recovery from him would be to cause him a loss which but for the drawee's mistake he would not have suffered.[1]

This theory may provide an adequate reason for denying a

[1] See Ames, "The Doctrine of Price *v.* Neal," 4 Harv. Law Rev. 297, 299.

recovery where it appears that there *were* prior indorsers and that recourse against them *is* lost. But as an explanation of the general rule it encounters a number of cases in which a recovery is denied even though there were no prior indorsers,[1] and it overlooks the fact that an acceptance alone, which of course does not release indorsers, precludes the drawee from setting up the forgery of the drawer's signature.[2]

§ 86. (5) **The theory that there is no mistake as to drawee's duty to holder.** — The denial of relief has also been supported upon the ground that, although the payment is made in misreliance upon a supposed duty to the *drawer*, there is no misreliance upon a supposed duty to the *holder*, the person to whom the money is paid, which is an essential element of the right to recover.

This principle — that the mistake must be as to the plaintiff's right against or duty toward the *defendant* — is offered by Professor Wigmore[3] as one which "seems to reconcile all of the various cognate instances and with a few exceptions, to lead to the conclusions actually adopted in the majority of jurisdictions," although he acknowledges that in the cases under consideration "mercantile custom or practical expediency, and not any consistent legal principle, has usually been the guide of the courts."

No case of the forgery of a drawer's signature has been found in which this theory — that the mistake must be as to the plaintiff's right against or duty to the *defendant* — has actually been made the basis of recovery. And while, as elsewhere appears, the prin-

[1] Howard *v.* Mississippi Bank, 1876, 28 La. Ann. 727; 26 Am. Rep. 105; Commercial, etc., Bank *v.* First Nat. Bank, 1868, 30 Md. 11; 96 Am. Dec. 554; Salt Springs Bank *v.* Syracuse Inst., 1863, 62 Barb. (N. Y. Sup. Ct.) 101; Levy *v.* U. S. Bank, 1802, 1 Binn. (Pa.) 27; Bank of St. Albans *v.* Farmers' Bank, 1838, 10 Vt. 141; 33 Am. Dec. 188; Johnston *v.* Commercial Bank, 1885, 27 W. Va. 343; 55 Am. Rep. 315.

[2] See Young *v.* Lehman, 1879, 63 Ala. 519; Wilson *v.* Alexander, 1842, 4 Ill. (3 Scam.) 392; Goddard *v.* Merchants' Bank, 1850, 4 N. Y. 147; Johnston *v.* Commercial Bank, 1885, 27 W. Va. 343; 55 Am. Rep. 315.

[3] "A Summary of Quasi-Contracts," 25 Am. Law Rev. 695, 705.

ciple has some judicial support, it has been pointed out that where, as in this case, the plaintiff's mistake is as to his duty to a third person to pay the money sought to be recovered, he is entitled to restitution (*ante*, § 19). Moreover, to say that the drawee of a bill, in making payment to the holder, relies upon two separate duties, — one to the drawer to pay the bill, and the other to the holder to pay it to him, — and that consequently if the drawer's signature is not genuine, the mistake is as to the former duty and not as to the latter, while if an indorsement is not genuine, the mistake is as to the latter and not as to the former, is to support a distinction which seems almost too slender and unsubstantial to be practicable.

§ 87. (6) **The theory that the rule is one of policy.** — None of the theories set forth in the preceding sections seems satisfactorily to account for the denial of relief to the drawee in the case of the forgery of the drawer's signature. The true reason for the rule, it is believed, is one of policy — the policy of maintaining confidence in the security of negotiable paper by making the time and place of acceptance or payment the time and place for the final settlement, as between drawee and holder, of the question of the genuineness of the drawer's signature. In most cases, conspicuously where the drawee is the drawer's banker, the business relations between the drawer and drawee are such that, not only is the drawee thoroughly familiar with the drawer's signature and consequently well qualified to discover a forgery, but it is peculiarly convenient for him to solve any doubt by inquiring of the drawer.

Of course, confidence in the security of negotiable paper would be still further strengthened if the same rule of policy were extended to cases of forged indorsements. But on the other hand, such an extension would work a hardship to the drawee, for in general he has no closer relations with the indorsers than has the holder, and therefore is in no better position to ascertain the genuineness of their signatures.

The view that the denial of relief to the drawee in the case of the forgery of the drawer's signature rests upon grounds of policy has received most persuasive judicial support. Lord MANS-

FIELD'S remark in *Price* v. *Neal*, that "this was one of those cases that could never be made clearer by argument," suggests that the origin of the rule lay in the notion of practical policy rather than in that of a definite legal principle. And in several of the strongest and most carefully considered cases, the rule has been expressly declared to be one of convenience:

Germania Bank v. *Boutell*, 1895, 60 Minn. 189; 62 N. W. 327; 27 L. R. A. 635; 51 Am. St. Rep. 519: MITCHELL, J. (p. 193): "In view of the use of this class of paper as money, it was considered that public policy required that, as between the drawee and good-faith holders, the drawee bank should be deemed the place of final settlement where all prior mistakes and forgeries should be corrected and settled once for all, and, if not then corrected, payment should be treated as final; that there must be a fixed and definite time and place to adjust and end these things as to innocent holders; and that that time and place should be the paying bank and the date of payment; and that, if not done then, the failure to do so must be deemed the constructive fault of the payee bank, which must take the consequences."

Dedham Nat. Bank v. *Everett Nat. Bank*, 1901, 177 Mass. 392; 59 N. E. 62; 83 Am. St. Rep. 286: HOLMES, C.J. (p. 395): "Probably the rule was adopted from an impression of convenience rather than for any more academic reason." [1]

[1] Mr. Justice STORY said, in United States Bank *v.* Bank of Georgia, 1825, 10 Wheat. (U. S.) 333, 355: "It is sufficient for us to declare, that we place our judgment in the present case, upon the ground, that the defendants were bound to know their own notes, and having received them, without objection, they cannot now recall their assent. We think this doctrine founded on public policy and convenience; and that actual loss is not necessary to be proved — for potential loss may exist, and the law will always presume a possible loss, in cases of this nature."

PHELPS, J., in Bank of St. Albans *v.* Farmers' Bank, 1838, 10 Vt. 141, 145; 33 Am. Dec. 188, said that the drawee is "the person to whom the bill itself points, as the legitimate source of information to others, and if he were permitted to dishonor a bill, after having once honored it, the very foundation of confidence in commercial paper would be shaken."

See also London, etc., Bank *v.* Bank of Liverpool, [1896] 1 Q. B. 7, 10; Jones *v.* Miners' & Merchants' Bank, 1910, 144 Mo. App. 428; 128 S. W. 829.

§ 88. (7) **The rule criticized.** — The doctrine of *Price* v. *Neal*, as it is called, has by no means escaped criticism.

"Many modern textwriters," said MITCHELL, J., in *Germania Bank* v. *Boutell*,[1] "some of them of learning and ability, have assailed the correctness of this doctrine, contending that the general rule as to money paid under mistake of fact should apply, and that the law ought to be that the bank, although in fault in not discovering the forgery of its customer's signature, can recover even from an innocent holder, if he will then be in no worse condition than if the bank had refused to pay the draft or check." [2]

In at least one jurisdiction, Pennsylvania, the rule has been changed by statute,[3] and in a few others the courts have refused to adopt it.[4]

§ 89. (II) **Mistake by payor for honor as to genuineness of drawer's signature.** — In the English case of *Wilkinson* v. *Johnson*,[5] one who paid for honor a bill on which the name of the

[1] 1895, 60 Minn. 189, 192; 62 N. W. 327; 27 L. R. A. 635; 51 Am. St. Rep. 519.

[2] Citing: 2 Parsons, "Notes and Bills," 80; Morse, "Banks," c. 33; Daniel, "Negotiable Instruments," c. 42; 9 Am. Law Rev. 411; note to People's Bank *v.* Franklin Bank, 17 Am. St. Rep. 889. See also dissenting opinion of CANTY, J., in Germania Bank *v.* Boutell, *supra;* Jones *v.* Miners' and Merchants' Bank, 1910, 144 Mo. App. 428; 128 S. W. 829, 830; First Nat. Bank *v.* Bank of Wyndmere, 1906, 15 N. D. 299; 108 N. W. 546; 10 L. R. A. (N. S.) 49.

[3] Tradesmen's Nat. Bank *v.* Third Nat. Bank, 1870, 66 Pa. St. 435; Chambers *v.* Union Nat. Bank, 1875, 78 Pa. St. 205; People's Savings Bank *v.* Cupps, 1879, 91 Pa. St. 315.

[4] First Nat. Bank *v.* Bank of Wyndmere, 1906, 15 N. D. 299; 108 N. W. 546; 10 L. R. A. (N. S.) 49; American Express Co. *v.* State Nat. Bank, 1911, 27 Okl. 824; 113 Pac. 711; 33 L. R. A. (N. S.) 188.

[5] 1824, 3 Barn. & C. 428, 436. ABBOTT, C. J.: "A bill is carried for payment to the person whose name appears as acceptor, or as agent of an acceptor, entirely as a matter of course. . . . But it is by no means a matter of course to call upon a person to pay a bill for the honor of an indorser; and such a call, therefore, imports on the part of the person making it, that the name of a correspondent, for whose honor the payment is asked, is actually on the bill. The person thus called upon ought certainly to satisfy himself that the name of his correspondent is really on the bill; but still his attention

drawer was forged, was allowed to recover. There appears to be no reason for this distinction between the case of the acceptor and that of the payor for honor, and the American courts have declined to differentiate them.[1] In *Goddard* v. *Merchant's Bank*,[2] however, one who paid for honor was allowed to recover upon the ground, apparently, that he paid without an opportunity to inspect the bill for the purpose of determining whether or not it was genuine.[3]

§ 90. (III) **Mistake as to genuineness of payor's signature.** — Where one pays to an innocent holder for value a bill or note on which his own name is forged, he is usually denied relief:

Johnston v. *Commercial Bank*, 1885, 27 W. Va. 343; 55 Am. Rep. 315: JOHNSON, P. (p. 359): "It seems to us from the review of the authorities, that it is a rule of commercial law too firmly established to be shaken, being sustained by an unbroken line of authorities for more than a century, that the drawee of a bill of exchange is presumed to know the handwriting of the drawer, and *a fortiori* the maker of a negotiable note is presumed to know his own signature, and if the drawee accepts or pays the bill, or the maker pays the negotiable note, in the hands of a *bona fide* holder, to which the drawer's or maker's name has been forged, he is bound by the act and cannot recover back the money so paid." [4]

may reasonably be lessened by the assertion, that the call itself makes to him *in fact*, though no assertion may be made *in words*."

[1] See Stephenson *v.* Mount, 1867, 19 La. Ann. 295; Goddard *v.* Merchants' Bank, 1850, 4 N. Y. 147; Salt Springs Bank *v.* Syracuse Savings Inst., 1863, 62 Barb. (N. Y. Sup. Ct.) 101.

[2] 1850, 4 N. Y. 147.

[3] This case is criticized in Bernheimer *v.* Marshall, 1858, 2 Minn. 78; 72 Am. Dec. 79.

[4] *Accord:* Mather *v.* Maidstone, 1856, 18 C. B. 273; Young *v.* Lehman, 1879, 63 Ala. 519, 523; Tyler *v.* Bailey, 1873, 71 Ill. 34, 37; Allen *v.* Sharpe, 1871, 37 Ind. 67, 73; 10 Am. Rep. 80; Third Nat. Bank *v.* Allen, 1875, 59 Mo. 310, 315; Jones *v.* Miners' & Merchants' Bank, 1910, 144 Mo. App. 428; 128 S. W. 829; Lewis *v.* White's Bank, 1882, 27 Hun (N. Y. Sup. Ct.) 396. See Ellis *v.* Ohio L. Ins. Co., 1885, 4 Ohio St. 628; 64 Am. Dec. 610; Ames, "The Doctrine of Price *v.* Neal," 4 Harv. Law Rev. 297, 302.

The Supreme Court of Massachusetts, however, has permitted a recovery.[1] Upon the principle contended for by Professor Wigmore (*ante*, § 86) the latter decision is correct, but in any other view, including that which rests the determination of these cases upon the ground of policy, it would seem that the loss must remain with the payor.[2]

§ 91. (IV) **Mistake as to genuineness of bill of lading attached to draft.** — Although the acceptor of a draft obviously cannot be expected to know the signature of the carrier's agent on a bill of lading accompanying the draft, it is held that money paid by the acceptor in reliance upon the genuineness of a forged bill of lading may not be recovered.[3] In the English case of *Leather* v. *Simpson*,[4] the decision appears to have rested mainly upon the doctrine that where equities are equal the legal title should prevail;[5] but in some of the American cases the point is made that the acceptor's mistake is not a mistake between him and the holder, but a mistake which affects his relation to the drawer alone.[6] Probably the policy of conserving

[1] Welch *v.* Goodwin, 1877, 123 Mass. 71; 25 Am. Rep. 24.

[2] In Wilson, Admr. *v.* Alexander, 1842, 4 Ill. (3 Scam.) 392, the court said (p. 395): "We are of the opinion it would be carrying the rule to an unreasonable extent, to charge the administrator with knowledge of the genuineness of an instrument, to which the name of his intestate purports to be affixed, as maker."

[3] Robinson *v.* Reynolds, 1841, 2 Q. B. 196; Leather *v.* Simpson, 1871, L. R. 11 Eq. 398; Hoffman *v.* Bank of Milwaukee, 1870, 12 Wall. (U. S.) 181; Goetz *v.* Bank of Kansas City, 1886, 119 U. S. 551; 7 S. Ct. 318; Young *v.* Lehman, 1879, 63 Ala. 519; Varney *v.* Monroe Nat. Bank, 1907, 119 La. 943; 44 So. 753; 13 L. R. A. (N. S.) 337; First Nat. Bank *v.* Burkham, 1875, 32 Mich. 328; Craig *v.* Sibbett, 1850, 15 Pa. St. 238; Randolph *v.* Merchants' Bank, 1874, 7 Baxt. (66 Tenn.) 458.

[4] 1871, L. R. 11 Eq. 398.

[5] Malins, V. C., said (p. 407): "The equities between these parties are equal; the parties are equally innocent in the transaction; they have all been imposed upon; but there is this difference, that one of them, by the course of the transaction, has been in possession of the money, and I am at a loss to see any ground upon which I can be justified in making a decree that that money should be restored."

[6] See Hoffman *v.* Bank of Milwaukee, 1870, 12 Wall. (U. S.) 181, 190, 191; Goetz *v.* Bank of Kansas City, 1886, 119 U. S. 551, 556, 557; 7 S. Ct. 318; First Nat. Bank *v.* Burkham, 1875, 32 Mich. 328.

the security of negotiable paper has also contributed to the result.[1]

§ 92. (V) **Effect of negligence.** — It is a general rule that one who confers a benefit by mistake will not be denied relief because of the fact that the mistake was the result of his own negligence (*ante*, § 15). Accordingly, one who pays negotiable paper which has been altered, or upon which an indorsement has been forged, should be allowed to recover even though, in the exercise of reasonable care, he ought to have discovered the alteration or forgery.[2]

Although, as has been seen (*ante*, § 79), the drawee of a bill who pays in misreliance upon a forged signature of the supposed drawer is not ordinarily allowed to recover, if it appears that the exercise of reasonable care by the payee would have resulted in the discovery of the forgery, restitution will, according to the weight of authority, be enforced:

Ellis v. *Ohio Life Ins. Co.*, 1855, 4 Ohio St. 628; 64 Am. Dec. 610: Action by drawee to recover money paid on a forged check. The payee purchased the check from a stranger without inquiry as to his identity or his right to the check. RANNEY, J. (p. 668): "We have nowhere doubted the wisdom or policy of the rule, which allows an innocent holder to require the drawee to pass upon the signature of the drawer, and makes him responsible for the decision he makes; nor the justice of permitting the former to retain the money received upon a forgery, when some one must suffer by the mistake. But we must be better informed than at present before we shall be

[1] In First Nat. Bank *v.* Burkham, 1875, 32 Mich. 328, COOLEY, J., said (p. 331): "The beauty and value of the rules governing commercial paper consist in their perfect certainty and reliability; they would be worse than useless if the ultimate responsibility for such paper, as between payee and drawee, both acting in good faith, could be made to depend on the motives which influenced the latter to honor the paper."

[2] Nat. Bank of Commerce *v.* Nat. M. B. Assn., 1873, 55 N. Y. 211; 14 Am. Rep. 232, (but see Bank of Commerce *v.* Union Bank, 1850, 3 N. Y. 230, and Clews *v.* N. Y. Nat. Banking Assn., 1882, 89 N. Y. 418; 42 Am. Rep. 303); City Bank *v.* First Nat. Bank, 1876, 45 Tex. 203. And see Imperial Bank *v.* Bank of Hamilton, [1903], A. C. 49.

able to perceive the justice or propriety of permitting a holder to profit by a mistake which his own negligent disregard of duty has contributed to induce the drawee to commit." [1]

But there are cases to the contrary.[2]

Negligence in the payment of altered or forged negotiable paper should not be confused with negligence in failing promptly to give notice to the payee upon the discovery of the alteration or forgery. Tardiness in giving such notice, if it prejudices the defendant, will defeat the plaintiff's right to restitution,[3] and, in some cases, prejudice to the defendant has been presumed.[4]

[1] *Accord:* Nat. Bank *v.* Bangs, 1871, 106 Mass. 441; 8 Am. Rep. 349; First Nat. Bank of Danvers *v.* First Nat. Bank of Salem, 1890, 151 Mass. 280; 24 N. E. 44; 21 Am. St. Rep. 450; State Bank *v.* First Nat. Bank, 1910, 87 Neb. 351; 127 N. W. 244; 29 L. R. A. (N. S.) 100; Williamsburgh Trust Co. *v.* Tum Suden, 1907, 120 App. Div. 518; 105 N. Y. Supp. 335; Greenwald *v.* Ford, 1906, 21 S. D. 28; 109 N. W. 516; People's Bank *v.* Franklin Bank, 1889, 88 Tenn. 299; 12 S. W. 716; 6 L. R. A. 724; 17 Am. St. Rep. 884; Rouvant *v.* San Antonio Nat. Bank, 1885, 63 Tex. 610; Canadian Bank of Commerce *v.* Bingham, 1902, 30 Wash. 484; 71 Pac. 43; 60 L. R. A. 955 (see also s. c. 1907, 46 Wash. 657; 91 Pac. 185). And see Gloucester Bank *v.* Salem Bank, 1820, 17 Mass. 33; First Nat. Bank *v.* Ricker, 1874, 71 Ill. 439; 22 Am. Rep. 104; Germania Bank *v.* Boutell, 1895, 60 Minn. 189; 62 N. W. 327; 27 L. R. A. 635; 51 Am. St. Rep. 519; Ford *v.* People's Bank, 1906, 74 S. C. 180; 54 S. E. 204; 10 L. R. A. (N. S.) 63; 114 Am. St. Rep. 986. But see Bank of Williamson *v.* McDowell County Bank, 1910, 66 W. Va. 545; 66 S. E. 761. In Bank of Williamson *v.* McDowell County Bank, *supra*, it was held that money paid on a forged check could not be recovered if both the drawee and holder were negligent.

[2] Howard *v.* Mississippi Bank, 1876, 28 La. Ann. 727; 26 Am. Rep. 105; Commercial Bank *v.* First Nat. Bank, 1868, 30 Md. 11; 96 Am. Dec. 554; Bank of St. Albans *v.* Farmers' Bank, 1838, 10 Vt. 141; 33 Am. Dec. 188.

[3] Yatesville Banking Co. *v.* Fourth Nat. Bank, 1911, Ga. App. ; 72 S. E. 528; Schroeder *v.* Harvey, 1874, 75 Ill. 638; Continental Nat. Bank *v.* Metropolitan Nat. Bank, 1903, 107 Ill. App. 455; Third Nat. Bank. *v.* Allen, 1875, 59 Mo. 310; Canal Bank *v.* Bank of Albany, 1841, 1 Hill (N. Y.) 287; Ryan *v.* Bank of Montreal, 1886, 12 Ont. 39; Iron City Nat. Bank *v.* Fort Pitt Nat. Bank, 1893, 159 Pa. St. 46; 28 Atl. 195 (*cf.* McNeely Co. *v.* Bank of N. America, 1908, 221 Pa. St. 588; 70 Atl. 891); City Bank *v.* First Nat. Bank, 1876, 45 Tex. 203. See United States *v.* Nat. Exch. Bank, 1909, 214 U. S. 302; 29 S. Ct. 665, (pension check).

[4] Continental Nat. Bank *v.* Metropolitan Nat. Bank, 1903, 107 Ill. App. 455.

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CHAPTER VI

MISRELIANCE ON CONTRACT UNENFORCEABLE BECAUSE OF STATUTE OF FRAUDS

§ 93. In general.
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§ 107. Same: Improvements on land.
§ 108. (VII) Necessity of demand: Statute of Limitations: Interest.

§ 93. **In general.** — The provisions of the fourth and seventeenth sections of the Statute of Frauds, 29 Car. II. c. 3, which with various modifications have been generally adopted in America, are familiar.[1] To what contracts the statute applies is a question beyond the scope of this treatise.[2] As to the effect of non-compliance with its provisions, there is a divergence of authority, due chiefly, perhaps, to variations in the wording of the statute, but in large measure to difference of interpretation. In some jurisdictions it is held that contracts

[1] For the provisions of the statute and a concise discussion of its requirements, see Harriman, "Contracts," §§ 568, 569, 595–605.

[2] See Harriman, "Contracts," §§ 570–94.

within the statute are utterly void.[1] In a larger number the statute is regarded as enacting a rule of remedial procedure only, and consequently affecting, not the validity, but only the enforceability of contracts to which it applies.[2] Where the statute expressly declares that certain contracts, unless they conform to its requirements, shall be void, the first view would seem to be sound. But in jurisdictions in which, following the English model, it is provided that " no action shall be brought whereby to charge " a promisor, or " no contract . . . shall be allowed to be good," the second view is to be preferred. In either view a contract within the statute is unenforceable — the supposed contract right is unavailable. A benefit conferred in misreliance upon such a contract should therefore be restored unless there are special circumstances which justify its retention.[3]

[1] Feeney *v.* Howard, 1889, 79 Cal. 525; 21 Pac. 984; 4 L. R. A. 826; 12 Am. St. Rep. 162 (but see Nunez *v.* Morgan, 1888, 77 Cal. 427, 432; 19 Pac. 753); Raub *v.* Smith, 1886, 61 Mich. 543; 28 N. W. 676; 1 Am. St. Rep. 619; Houghtaling *v.* Ball, 1855, 20 Mo. 563; Dung *v.* Parker, 1873, 52 N. Y. 494; Madigan *v.* Walsh, 1868, 22 Wis. 501. For a collection of statutory provisions and cases, see 29 Am. & Eng. Ency. 814.

[2] Leroux *v.* Brown, 1852, 12 C. B. 801; Britain *v.* Rossiter, 1879, 11 Q. B. D. 123; Obear *v.* Bank, 1895, 97 Ga. 587; 25 S. E. 335; 33 L. R. A. 384; Ames *v.* Ames, 1910, 46 Ind. App. 597; 91 N. E. 509; Merchant *v.* O'Rourke, 1900, 111 Ia. 351; 82 N. W. 759; Townsend *v.* Hargraves, 1875, 118 Mass. 325; Philbrook *v.* Belknap, 1834, 6 Vt. 383. For a collection of statutory provisions and cases, see 29 Am. & Eng. Ency." 814.

The theory of unenforceability is often less accurately expressed by the use of the term "voidable." See, for example, Collins *v.* Thayer, 1874, 74 Ill. 138. Again it is frequently said that the statute enacts a rule of evidence. See Maddison *v.* Alderson, 1883, 8 App. Cas. 467, 488; Townsend *v.* Hargraves, 1875, 118 Mass. 325; Crane *v.* Powell, 1893, 139 N. Y. 379; 34 N. E. 911. But the language of the English statute, as well as the rule that the statute must be affirmatively pleaded and the holding that a memorandum made after the commencement of the action will not satisfy the statute, indicate that it is more than a mere rule of evidence. See Williston, " Sales," § 71.

[3] In a recent New York case it appeared that the plaintiff had entered into an oral contract under which he had rendered services to the other party, who had died after the plaintiff's action on the contract had been commenced. The plaintiff, as a result of the death of the other

§ 94. (I) **Misreliance on Contract: Assumption of risk: Mistake of law.** — If, in performing a contract unenforceable because of the Statute of Frauds, one is unconscious of any question as to its enforceability, his performance may properly be said to be in misreliance on the contract (*ante*, § 10). And the fact that one's ignorance of the unenforceability of his contract is due to his own negligence is generally immaterial (*ante*, § 15). But if one believes his contract to be unenforceable, or indeed is conscious of a doubt as to its enforceability, he assumes the risk and cannot be said to rely upon the contract (*ante*, § 16). No case arising out of a contract unenforceable because of the Statute of Frauds has been found in which the denial of relief is placed squarely upon this ground. This is probably due in part to a failure to realize that the obligation to make restitution rests upon the doctrine of misreliance, and in part to the fact that, unless the question of enforceability is a subject of communication between the parties, the state of the plaintiff's mind on the question is difficult of satisfactory proof.

In many cases of misreliance upon a contract unenforceable because of the Statute of Frauds, the mistake is a mistake of law, resulting either from ignorance of the existence of the statute or from a misconception of the extent of its application. As elsewhere appears (*ante*, § 35), in nearly all jurisdictions money paid under a mistake of law is not recoverable. But the applicability of the rule to these cases appears to have been generally overlooked.[1]

party to the contract, could not testify as to its terms, and sought to amend his complaint so as to recover in *quantum meruit*. The motion was denied. Donovan *v.* Harriman, 1910, 139 App. Div. 586; 124 N. Y. Supp. 194. While the contract in this case was not within the Statute of Frauds it was unenforceable because of a rule of evidence, and it is submitted that the plaintiff was entitled to relief under the doctrine of this chapter.

[1] In Thomas *v.* Brown, 1876, L. R. 1 Q. B. D. 714, the point was made. It was an action to recover a deposit made under contract to buy leasehold. The plaintiff repudiated the contract on the ground that, because the vendor's name did not appear in the contract, the memorandum was insufficient to satisfy the Statute of Frauds. MELLOR, J. (p. 721): "First, on the face of these conditions of sale, it is obvious that

§ 95. (II) **Retention of benefit inequitable**: (1) **When defendant defaults.** — When it is the defendant who fails to perform the unenforceable agreement, the plaintiff being willing to continue performance, the retention by the defendant of the benefit of the plaintiff's performance is manifestly unjust:

Richards v. *Allen*, 1840, 17 Me. 296: Assumpsit for the value of bricks and oxen delivered in part payment under an oral contract to purchase land which the defendant repudiated. WESTON, C.J. (p. 299): "The contract between the parties in regard to the farm was one, which being by parol, could not be enforced at law. It was, however, morally binding; and payments made by the plaintiff, on account of the purchase, could not be reclaimed so long as the defendant was in no fault. But if he, without any justifiable cause, repudiated the contract, and refused to be bound by it, a right of reclamation would accrue to the plaintiff, to the extent required by the principles of justice and equity."

The obligation to make restitution, under such circumstances, has been enforced in a great number and variety of cases. *Money* paid,[1] either under an oral contract for the sale of an interest in

the plaintiff paid the deposit knowing at the time that the name of the defendant did not appear on the memorandum of agreement otherwise than as 'the vendor.' She voluntarily paid the £70, with full knowledge that the vendor's name was not disclosed on the contract, and so far accepted the description as sufficient. . . . In an action like the present, for money had and received, the plaintiff can only recover money paid without knowledge of the real facts — in ignorance of facts which, if they had been known, would have left the plaintiff an option whether she would pay or not. . . . It is unnecessary to allude to the difference between ignorance of the law and ignorance of the facts."

[1] *Contract for sale of land:* Frey *v.* Stangl, 1910, 148 Ia. 522; 125 N. W. 868; Brashear *v.* Rabenstein, 1905, 71 Kan. 455; 80 Pac. 950; Jellison *v.* Jordan, 1878, 68 Me. 373; Cook *v.* Doggett, 1861, 2 Allen (Mass.) 439; Pressnell *v.* Lundin, 1890, 44 Minn. 551; 47 N. W. 161; Interstate Hotel Co. *v.* Woodward, etc., Co., 1903, 103 Mo. App. 198; 77 S. W. 114; Whitaker *v.* Burrows, 1893, 71 Hun 478; 24 N. Y. Supp. 1011; Wilkie *v.* Womble, 1884, 90 N. C. 254; Durham *v.* Wick, 1904, 210 Pa. St. 128; 59 Atl. 824; 105 Am. St. Rep. 789; Thomas *v.* Sowards, 1870, 25 Wis. 631. For additional cases, see 29 Am. & Eng. Ency., 838.

land or under an oral contract not to be performed within a year, appears to be everywhere recoverable. The same is true of the value of *services rendered*.[1] Cases of *property* transferred in performance of a contract within the statute are not quite so frequent, but the authorities agree that restitution in value may be enforced.[2]

The purchaser has also a lien in equity for the money paid: Lyttle *v.* Davidson, 1902, 23 Ky. Law Rep. 2262; 67 S. W. 34; Devore *v.* Devore, 1897, 138 Mo. 181; 39 S. W. 68; Vaughn *v.* Vaughn, 1898, 100 Tenn. 282; 45 S. W. 677.

Contract not to be performed within one year: Knowlman *v.* Bluett, 1874, L. R. 9 Exch. 307; Swift *v.* Swift, 1873, 46 Cal. 266; Weber *v.* Weber, 1903, 25 Ky. Law Rep. 908; 76 S. W. 507; Binion *v.* Browning, 1858, 26 Mo. 270; Bowman *v.* Wade, 1909, 54 Or. 347; 103 Pac. 72. See Montague *v.* Garnett, 1867, 3 Bush (66 Ky.) 297.

[1] *Contract for sale of land:* Hull *v.* Thoms, 1910, 82 Conn. 647; 74 Atl. 925, (devise); Mills *v.* Joiner, 1884, 20 Fla. 479; Flowers *v.* Poorman, 1909, 43 Ind. App. 528; 87 N. E. 1107; Stout's Admr. *v.* Royston, 1908, 32 Ky. Law Rep. 1055; 107 S. W. 784; McDaniel *v.* Hutcherson, 1910, 136 Ky. 412; 124 S. W. 384, (devise); *In re* Williams, 1895, 106 Mich. 490; 64 N. W. 490, (devise); Cozad *v.* Elam, 1905, 115 Mo. App. 136; 91 S. W. 434; Gay *v.* Mooney, 1901, 67 N. J. L. 27; 50 Atl. 596, (devise); King *v.* Brown, 1842, 2 Hill (N. Y.) 485; Graham *v.* Graham, 1909, 134 App. Div. 777; 119 N. Y. Supp. 1013; Stevens' Exrs. *v.* Lee, 1888, 70 Tex. 279; 8 S. W. 40, (devise); McCrowell *v.* Burson, 1884, 79 Va. 290; Taylor *v.* Thieman, 1907, 132 Wis. 38; 111 N. W. 229; 122 Am. St. Rep. 943 (devise). For additional cases, see 29 Am. & Eng. Ency., 839.

Contract not to be performed within one year: Knowlman *v.* Bluett, 1874, L. R. 9 Exch. 307; Franklin *v.* Matoa, etc., Min. Co., 1907, 158 Fed. 941; 86 C. C. A. 145; 16 L. R. A. (N. S.) 381; Frazer *v.* Howe, 1883, 106 Ill. 563; Wonsettler *v.* Lee, 1888, 40 Kan. 367; 19 Pac. 862; Chapman *v.* Rich. 1874, 63 Me. 588; Williams *v.* Bemis, 1871, 108 Mass. 91; 11 Am. Rep. 318; Giles *v.* McEwan, 1896, 11 Manitoba 150; Cadman *v.* Markle, 1889, 76 Mich. 448; 43 N. W. 315; 5 L. R. A. 707; Spinney *v.* Hill, 1900, 81 Minn. 316; 84 N. W. 116; Lockwood *v.* Barnes, 1842, 3 Hill (N. Y.) 128; 38 Am. Dec. 620; Carter *v.* Brown, 1871, 3 S. C. 298. For additional cases, see 29 Am. & Eng. Ency. 839.

[2] Booker *v.* Wolf, 1902, 195 Ill. 365; 63 N. E. 265, (goods); Montague *v.* Garnett, 1867, 3 Bush (66 Ky.) 297, (goods); Bethel *v.* Booth, 1903, 115 Ky. 145; 72 S. W. 803, (assets and good will of a business); Richards *v.* Allen, 1840, 17 Me. 296, (goods); Bassett *v.* Bassett, 1867, 55 Me. 127, (lands); Dix *v.* Marcy, 1875, 116 Mass. 416, (land); Peabody *v.* Fellows, 1901, 177 Mass. 290; 58 N. E. 1019, (land); Cromwell *v.* Norton, 1906, 193 Mass. 291; 79 N. E. 433; 118 Am. St. Rep. 499, (land); Todd *v.* Bettingen, 1910, 109 Minn. 493; 124 N. W. 443, (stock); Day *v.* N. Y., etc., R. Co., 1873, 51 N. Y. 583, (land).

Benefits accruing to the defendant, not from the plaintiff's performance of the contract, but from other acts of the plaintiff in reliance upon the contract, fall within the principle. Thus, taxes paid by the purchaser of land under an oral contract which the vendor repudiates or is unable to perform, are recoverable.[1] The making of improvements on the land by the purchaser likewise results in quasi contractual obligation, the extent of which, however, will be hereafter separately considered (*post*, § 102).

§ 96. **Same: Effect of tender of specific restitution.** — In the Vermont case of *Hawley* v. *Moody*[2] it was held that one who defaults after having received personal property in part performance of the contract cannot, without the consent of the other party, revest the title of the thing received, and may be compelled, notwithstanding a tender of specific restitution, to make restitution in value. The plaintiff orally contracted for a lease of the defendant's premises and "paid the defendant at the time one hundred dollars, in a gold watch." The defendant refused to execute a lease and tendered the watch back to the plaintiff, but the plaintiff refused to receive it, and it was subsequently attached by one of the plaintiff's creditors and sold on execution against him. In an action of assumpsit to recover one hundred dollars, REDFIELD, J., said:[3]

"But if the party repudiating the future performance has himself received advances which he declines to pay for in the mode stipulated, it is regarded as equitable that he should refund in the usual mode for money had and for goods sold, and it is not in his power without the consent of the other party, to revest the title of the specific thing received.

"This seems to us the only view consistent with general principles applicable to the subject, or with the decided cases, and manifestly just and equitable. If the party has bought goods which he declines to pay for in the mode stipulated, and

[1] Holthouse *v.* Rynd, 1893, 155 Pa. St. 43; 25 Atl. 760; Masson *v.* Swan, 1871, 6 Heisk. (53 Tenn.) 450; Vaughn *v.* Vaughn, 1898, 100 Tenn. 282; 45 S. W. 677.

[2] 1852, 24 Vt. 603.

[3] At page 606.

which, but for his own act he might do, he ought and he must be content to pay in the usual mode of paying for goods sold and delivered, and this recovery may be had under the general counts."

This decision is disapproved by Professor Keener upon the ground that the primary obligation of the defendant was to make specific restitution and that consequently the tender of such restitution threw the risk of subsequent loss upon the plaintiff. He says:[1]

"It is submitted that the true nature of the obligation is that of restitution, the law compelling the party who is not willing or able to make specific restitution, to make restitution in value, a court of law, as distinguished from a court of equity, having no means by which to compel the defendant to make specific restitution. The true nature of this obligation becomes more apparent if we consider a case where, because of the subject matter of the contract, a court of equity will take jurisdiction. Take the case of a defendant receiving from a plaintiff a conveyance of land, in exchange for which he agrees orally to convey to the plaintiff another piece of land. If he refuses to convey this land the obligation which a court of equity will impose upon him is to restore specifically to the plaintiff that which he received from him, the court treating him for this purpose as a constructive trustee of the land conveyed to him. The obligation of specific restitution is imposed upon him for the reason that it is the unjust detention of that piece of property which enriches him at the expense of the plaintiff, and therefore renders his conduct inequitable and against conscience. Now, the fact that in a given case the subject matter of a contract is such that a court of equity will not take jurisdiction, should not change the character of the obligation when a court of law adopting equitable principles attempts to give to a plaintiff at law such relief as its machinery enables it to give."

Conceding the force of this argument,[2] it does not follow that an obligation to make specific restitution actually exists

[1] "Quasi-Contracts," pp. 286, 287.

[2] See Ramey *v.* Slone, 1901, 23 Ky. Law Rep. 301; 62 S. W. 879, where the heirs at law of one who, by assignment of title bonds, had transferred

at law. There are few, if any, cases which recognize it,[1] and the courts generally describe the obligation, not as an obligation to return the property received, but as an obligation to pay its value.[2]

§ 97. **Same: Liability of purchaser or lessee for use and occupation.** — A purchaser of land under an oral contract, who is given possession by his vendor and subsequently defaults, is liable for the value of whatever use and occupation of the premises he may have enjoyed.[3] The act of the vendor in giving the purchaser possession without a conveyance of title may not be, strictly speaking, a part performance of the contract, but it is unquestionably an act in reliance upon the contract, and the benefit resulting to the purchaser raises an obligation to make restitution. A lessee who occupies premises under an oral lease within the statute is similarly liable.[4] In the latter case,

an equitable title in land were allowed to recover the land upon proof that the transferee had failed to perform his oral agreement to obtain the conveyance of other lands to the transferor.

[1] In Keath *v.* Patton, 1829, 2 Stew. (Ala.) 38, and Luey *v.* Bundy, 1838, 9 N. H. 298; 32 Am. Dec. 359, the plaintiff was allowed to recover in trover for the conversion of personal property delivered to the defendant in performance of an oral contract within the Statute of Frauds.

[2] Dix *v.* Marcy, 1875, 116 Mass. 416, and Day *v.* New York, etc., R. Co., 1873, 51 N. Y. 583, are typical. The former was a case of a conveyance of land, and the court said (p. 418): "A person who has received a benefit under such an agreement, and then repudiates it, is held to pay for that which he has received." In the latter, likewise a case of the conveyance of land, the court said (p. 590): "A party who has received anything under such an agreement, and then has refused to perform it, ought in justice to pay for what he has received, and hence the law for the purpose of doing justice to the other party will imply an assumpsit." Jarboe *v.* Severin, 1882, 85 Ind. 496, is an exception to the rule, the court saying that the implied promise of the party in default under the contract is that he "will return whatever he has received thereunder or its value."

[3] Davidson *v.* Ernest, 1845, 7 Ala. 817; Doe *v.* Cockron, 1835, 1 Scam. (2 Ill.) 209; Patterson *v.* Stoddard, 1860, 47 Me. 355; 74 Am. Dec. 490; Dwight *v.* Cutler, 1855, 3 Mich. 566; 64 Am. Dec. 105.

[4] Smith *v.* Pritchett, 1893, 98 Ala. 649; 13 So. 569; King *v.* Woodruff, 1854, 23 Conn. 56; 60 Am. Dec. 625; Donohue *v.* Chicago Bank Note Co., 1890, 37 Ill. App. 552; Talamo *v.* Spitzmiller, 1890, 120 N. Y. 37; 23 N. E. 980; 8 L. R. A. 221; 17 Am. St. Rep. 607.

however, the obligation is not strictly quasi contractual, but is incidental to the relation of landlord and tenant created by the lessee's occupancy of the land in subordination to the lessor's title and with the lessor's consent.[1] Although the lease is said to be void or unenforceable, the terms of the lessee's obligation for use and occupation, including the amount payable and the time for payment, are governed exclusively by its provisions,[2] and furthermore, the lessee is ordinarily liable for an entire rental period whether or not he continues throughout the period actually to occupy the premises.[3] In substance and effect this amounts to a partial enforcement of the oral lease.[4]

§ 98. **Retention of benefit inequitable**: (2) **When plaintiff defaults.** — When it is the plaintiff who makes default under the unenforceable contract, the defendant being willing to perform, the justice of a recovery in quasi contract by the plaintiff is not so clear. By the weight of authority it is held that the conduct of the plaintiff in refusing to proceed under the contract justifies the retention by the defendant of the benefit of the plaintiff's part performance:

[1] Crawford *v.* Jones, 1875, 54 Ala. 459; Donohue *v.* Chicago Bank Note Co., 1890, 37 Ill. App. 552; Stover *v.* Cadwallader, 1882, 2 Penny. (Pa.) 117. In Morehead *v.* Watkyns, 1844, 5 B. Mon. (44 Ky.) 228, 231, it was suggested that upon principle the lessor should recover the value of the estate whether or not the lessee actually remained in occupation. This would be purely quasi contractual.

[2] Doe *v.* Bell, 1793, 5 Term R. 471; King *v.* Woodruff, 1854, 23 Conn. 56; 60 Am. Dec. 625; Donohue *v.* Chicago Bank Note Co., 1890, 37 Ill. App. 552; Evans *v.* Wonona Lumber Co., 1883, 30 Minn. 515; 16 N. W. 404; Talamo *v.* Spitzmiller, 1890, 120 N. Y. 37; 23 N. E. 980; 8 L. R. A. 221; 17 Am. St. Rep. 607. See Dobbs *v.* Atlas Elevator Co., 1910, 25 S. D. 177; 126 N. W. 250, 252.

[3] Smallwood *v.* Sheppards, [1895] 2 Q. B. 627; Donohue *v.* Chicago Bank Note Co., 1890, 37 Ill. App. 552; Laughran *v.* Smith, 1878, 75 N. Y. 205; Talamo *v.* Spitzmiller, 1890, 120 N. Y. 37; 23 N. E. 980; 8 L. R. A. 221; 17 Am. St. Rep. 607.

[4] In some cases it is expressly declared that the statute will not prevent the enforcement of an oral lease in so far as it has been executed. See Walsh *v.* Colclough, 1893, 56 Fed. 778; 6 C. C. A. 114; 9 U. S. App. 537; Robb *v.* San Antonio St. R., 1891, 82 Tex. 392; 18 S. W. 707.

Thomas v. *Brown*, 1876, 1 Q. B. D. 714: Action to recover a deposit made by the vendee under a contract to buy a leasehold. The memorandum was claimed by the plaintiff to be insufficient to satisfy the Statute of Frauds. MELLOR, J. (p. 722): "Now, is there anything unconscientious in the defendant keeping the money? I can see nothing. The breaking off of the agreement was not in any sense the fault of the vendor. He was always ready and willing to complete the purchase and execute a conveyance, but the vendee chooses to set up this question about the Statute of Frauds, and to say, 'Although I can have the contract performed if I please, I repudiate it.' Under these circumstances, I think it would be quite monstrous if the plaintiff could recover, and I am glad to think that the authorities are all opposed to her claim."

Accordingly neither *money* paid,[1] nor the value of *services* rendered [2] or of *property* delivered,[3] in part performance of the contract may be recovered. Analogously, a purchaser of land under an oral contract is not liable for use and occupation to a vendor who refuses to convey.[4]

[1] York *v.* Washburn, 1902, 118 Fed. 316 (C. C. Minn.); Crabtree *v.* Welles, 1857, 19 Ill. 55, (but see Collins *v.* Thayer, 1874, 74 Ill. 138); Gammon *v.* Butler, 1861, 48 Me. 344; Coughlin *v.* Knowles, 1843, 7 Metc. (Mass.) 57; 39 Am. Dec. 759, (compare King *v.* Welcome, 1857, 5 Gray 41); McKinney *v.* Harvie, 1887, 38 Minn. 18; 35 N. W. 668; 8 Am. St. Rep. 640; Sims *v.* Hutchins, 1847, 8 Smed. & M. (16 Miss.) 328, (but see Hairston *v.* Jaudon, 1869, 42 Miss. 380, 386); Abbott *v.* Draper, 1847, 4 Denio (N. Y.) 51; Collier *v.* Coates, 1854, 17 Barb. (N. Y. Sup. Ct.) 471; Hoskins *v.* Mitcheson, 1857, 14 U. C. Q. B. (Ont.) 551; Cobb *v.* Hall, 1857, 29 Vt. 510; Johnson *v.* Puget Mill Co., 1902, 28 Wash. 515; 68 Pac. 867.

[2] Swanzey *v.* Moore, 1859, 22 Ill. 63; 74 Am. Dec. 134, (but see Collins *v.* Thayer, 1874, 74 Ill. 138); Congdon *v.* Perry, 1859, 13 Gray (Mass.) 3, (compare King *v.* Welcome, 1857, 5 Gray 41); Kriger *v.* Leppel, 1889, 42 Minn. 6; 43 N. W. 484; Galvin *v.* Prentice, 1871, 45 N. Y. 162; 6 Am. Rep. 58; Abbott *v.* Inskip, 1875, 29 Oh. St. 59; Shaw *v.* Shaw, 1834, 6 Vt. 69; Mack *v.* Bragg, 1858, 30 Vt. 571.

[3] Venable *v.* Brown, 1876, 31 Ark. 564; Duncan *v.* Baird, 1839, 8 Dana (38 Ky.) 101; Lane *v.* Shackford, 1830, 5 N. H. 130; Dowdle *v.* Camp, 1815, 12 Johns. (N. Y.) 451.

[4] Bell *v.* Ellis, 1832, 1 Stew. & P. (Ala.) 294; Brown *v.* Randolph, 1901, 26 Tex. Civ. App. 66; 62 S. W. 981. See Lucas *v.* McGuire, 1906, 29 Ky. Law Rep. 1068; 96 S. W. 867.

There are a few cases, even in jurisdictions where a failure to comply with the requirements of the statute does not completely nullify the contract, which require the defendant to make restitution notwithstanding the plaintiff's default:

King v. *Welcome*, 1857, 5 Gray (Mass.) 41: Action on a *quantum meruit* for work done under an oral contract not to be performed within a year. Plaintiff made default. THOMAS, J. (p. 42): "Upon the reason of the thing, and looking at the object and purpose of the statute, the result is clear. So far as it concerns the prevention of fraud and perjury, the same objection lies to the parol contract, whether used for the support of, or in defense to an action. The gist of the matter is, that, in a court of law, and upon important interests, the party shall not avail himself of a contract resting in words only, as to which the memories of men are so imperfect, and the temptations to fraud and perjury so great. . . .

"Looking at the mere letter of the statute, the suggestion is obvious, that no action is brought upon the contract. But the defendant seeks to 'charge the plaintiff therewith,' to establish it by proof, to enforce it in a court of law, and to avail himself of its provisions. And if the defense succeeds, the plaintiff is in effect charged with and made to suffer for the breach of a contract which he could not enforce, and which could not be enforced against him." [1]

The case of *King* v. *Welcome*, just quoted, is severely criticized by Professor Keener,[2] whose principal arguments against it may be summarized as follows: First, that to refuse a recovery would not be "to charge" the plaintiff with the con-

[1] *Accord:* Comes *v.* Lamson, 1844, 16 Conn. 246, (services; contract not to be performed within one year); Bently *v.* Smith, 1907, 3 Ga. App. 242; 59 S. E. 720, (services; contract not to be performed within one year); Bernier *v.* Cabot Mfg. Co., 1880, 71 Me. 506; 36 Am. Rep. 343, (services; contract not to be performed within one year); Freeman *v.* Foss, 1887, 145 Mass. 361; 14 N. E. 141; 1 Am. St. Rep. 467, (services; contract not to be performed within one year). And see McGartland *v.* Steward, 1860, 2 Houst. (Del.) 277, (services; contract not to be performed within one year); Collins *v.* Thayer, 1874, 74 Ill. 138, (contract for sale of land).

[2] "Quasi-Contracts," pp. 234–8.

tract, because the phrase " to charge therewith " means merely to hold liable for a *breach* of the contract. Second, that the statute being intended only to afford a defense when one is sued for a breach of contract, it should be used as a shield only, and not as a sword for the enforcement of a demand which would otherwise be refused. Third, that the case leads, in Massachusetts, to the queer result that one who performs a contract within the statute can recover only according to the terms of the contract,[1] while one who refuses to perform can recover the value of his partial performance irrespective of the contract.[2]

The view supported by Professor Keener and by the weight of judicial authority, however, is likewise open to objection, in that it denies to one who discovers the unenforceability of his contract after part performance, and upon such discovery is willing to reduce it to writing, the right to compel the other party to the contract either to make the contract enforceable by reducing it to writing or to restore the value of the benefit already received through part performance. This hardship has been recognized. In *Collier* v. *Coates*,[3] the court said:

"Cases of great hardship are suggested as a reason for the adoption of the rule contended for by the plaintiff's counsel. One of which is, that otherwise the purchaser under such a contract might go on making payments until the last; and although satisfied his bargain is not an advantageous one, yet bound to make his payments or lose what he has paid, while the other party all this time is at perfect liberty to repudiate the arrangement, and may do so at the last moment, to the serious injury of the purchaser."

[1] Riley *v.* Williams, 1878, 123 Mass. 506. See *post*, § 100.

[2] The case also seems inconsistent with Coughlin *v.* Knowles, 1843, 7 Metc. (Mass.) 57; 39 Am. Dec. 759, holding that money paid upon a parol contract for the sale of land cannot be recovered if the vendor is willing to perform, and with Congdon *v.* Perry, 1859, 13 Gray (Mass.) 3, holding that the value of services rendered under a parol contract for the sale of land cannot be recovered if the vendor is willing to perform. The court attempts to distinguish the former case.

[3] 1854, 17 Barb. (N. Y.) 471, 475.

In other words, while by *King* v. *Welcome* a dishonest plaintiff is afforded a quasi contractual remedy against an honest defendant, by the opposite view an honest plaintiff is refused such a remedy against a dishonest defendant.

Both evils, it is believed, may be avoided by permitting the plaintiff in default to recover if it appears that before default he requested the defendant to join him in signing such a written memorandum as would comply with the requirements of the statute, and that the defendant refused or failed within a reasonable time so to do. Such a rule would amply protect the defendant and at the same time would save the plaintiff from the hardship of continuing the performance of a contract with the knowledge that while he can recover the value of his own performance, if he performs in full, he cannot specifically enforce the contract or recover compensatory damages for its breach.

§ 99. **Same: In jurisdictions where contract is void.** — In the jurisdictions in which non-compliance with the requirements of the Statute of Frauds is held to invalidate the contract instead of making it unenforceable, cases permitting a plaintiff in default to recover the value of the benefit conferred by his part performance are relatively more frequent:[1]

Nelson v. *Shelby Mfg. Co.*, 1892, 96 Ala. 515; 11 So. 695; 38 Am. St. Rep. 116: Action by plaintiff in default under oral contract to buy land to recover payments made. COLEMAN, J. (p. 526): "We find nothing in the earlier or present statutes of frauds which supports the conclusion that a contract not enforceable against a vendor as provided in the former, or which is declared void as to him by the present statute, because there is no sufficient written note or memorandum of the agreement to comply with its mandates, subscribed by him, and which affords the vendor complete protection against his vendee, may, by his election or willingness to perform, avoid the statute, and convert a contract it declares void into a valid agreement,

[1] Nelson *v.* Shelby Mfg. Co., 1892, 96 Ala. 515; 11 So. 695; 38 Am. St. Rep. 116; Scott *v.* Bush, 1873, 26 Mich. 418; 12 Am. Rep. 311; Brandeis *v.* Neustadtl, 1860, 13 Wis. 142; Thomas *v.* Sowards, 1870, 25 Wis. 631; Salb *v.* Campbell, 1886, 65 Wis. 405; 27 N. W. 45.

enforceable against a vendee, who has subscribed no note or memorandum of the agreement, and has done no more than pay a part of the purchase money. In such case, neither party is bound, and the contract is void by the very terms of the statute itself. A contract void under the statute of frauds is void for all purposes."

Professor Keener contends that even though the contract is void, a recovery by a plaintiff in default is unjust:[1]

"If it be assumed that the statute, while not rendering the contract illegal, does render it void, still it would seem that the plaintiff should not be allowed to recover against a defendant not in default. . . . In such a case the defendant seeks to defeat a recovery by the plaintiff, not because of a contract existing between them, but because that which was given to him, it was understood, should not be paid for, except in a certain event, and, therefore, to allow a recovery would be to defeat the intention of the parties as expressed between them."

The force of Professor Keener's argument cannot be denied. But his view of this case is open to the same criticism as was urged against his view of the case of the contract unenforceable but not void — that it practically compels the plaintiff to continue the performance of an agreement he cannot enforce. A rule which meets this objection has been suggested (*ante*, § 98). It should be applied, it is believed, to the case under discussion as well as to that arising under a statute which affects not the validity of a contract but only its enforceability.

§ 100. (III) **Right to restitution when neither party defaults.** — If the plaintiff has completely performed the contract on his side, or has performed all of the terms which are conditions precedent to the defendant's obligation, and the defendant is ready and willing to perform, the plaintiff cannot refuse to accept the defendant's performance and recover the value of the benefit of his own performance. The defendant offers to the plaintiff precisely that which by the terms of the contract the plaintiff had a right to expect to receive, and the element

[1] Keener, "Quasi-Contracts," p. 239.

of misreliance upon the contract, essential to the quasi contractual cause of action, is wanting:

Riley v. *Williams*, 1878, 123 Mass. 506: Action on *quantum meruit* for work done under oral contract by which the plaintiff was to receive a lot of land from the defendant, and certain blacksmith's work from a firm of blacksmiths. The plaintiff fully performed and then refused to accept payment as stipulated in the contract. AMES, J. (p. 506): "If he [plaintiff] was to be paid partly in a lot of land belonging to the female defendant, and partly in blacksmith's work to be furnished by Cameron and Emerson, and the jury were satisfied that the defendants were ready and willing, at all times to convey the land at its fair market value, and Cameron and Emerson were always ready to furnish the blacksmith's work for him when called for at agreed or reasonable prices, it is not for the plaintiff to object that this special contract was not binding because it was not in writing. It was wholly immaterial that no action could be maintained on this special contract, because it was not reduced to writing, if the defendants were ready and willing at all times to carry it into full effect. The plaintiff cannot force the defendants to take their stand upon the statute." [1]

In Wisconsin, however, it is held that since the contract is void the plaintiff may refuse to accept performance of it and insist upon restitution:

Koch v. *Williams*, 1892, 82 Wis. 186; 52 N. W. 257: Oral contract that the plaintiff should render certain services to the defendant, as compensation for which the defendant was to give the plaintiff certain real estate. The plaintiff performed but refused to accept the real estate and brought this action for the value of his services. ORTON, J. (p. 191): "The plaintiffs, having rendered valuable services to the defendants under this void contract, are entitled to recover what such services were reasonably worth. This, at first blush, might appear to be a

[1] Also: Day *v.* Wilson, 1882, 83 Ind. 463; 43 Am. Rep. 76, (purchase money paid); Galway *v.* Shields, 1877, 66 Mo. 313; 27 Am. Rep. 351, (purchase money paid for land); Green *v.* R. Co., 1877, 77 N. C. 95, (agreement to pay for wood by conveying land). But see Swift *v.* Swift, 1873, 46 Cal. 266.

hardship on the defendants, who never agreed to pay for such services in money, and have offered to pay according to the oral contract by a conveyance of the lot. But it is inevitable from holding the contract void. The statute must be complied with as long as it is in force. It is no hardship to put such a contract in writing, and if parties suffer by not complying with the statute it is a penalty due to their own negligence, and they have no reason to complain."

§ 101. (IV) **Right to restitution when contract enforceable in equity.** — It is nearly everywhere a settled doctrine of the courts of equity, resting upon their jurisdiction to prevent fraud, that an oral contract within the statute will be specifically enforced in favor of one who proves acts in reliance upon the contract which reasonably import the existence of the contract or are "unequivocally referable to the contract," and which make it impossible to place him *in statu quo*.[1] The acts most frequently relied upon are the taking or giving of possession under contracts for the sale or lease of land, and the making of improvements. When, as the result of these or other sufficient acts, the contract becomes enforceable in equity, though not at law, there may seem to be little reason for raising an obligation to make restitution, even if the defendant defaults. It has been held in some jurisdictions that no such obligation exists, and that consequently neither money paid[2] nor the

[1] Maddison *v.* Alderson, 1883, 8 App. Cas. 467, 476, (land); Hodson *v.* Heuland, [1896] 2 Ch. 428, (land); Williams *v.* Morris, 1877, 95 U. S. 444, (land); Cooley *v.* Lobdell, 1897, 153 N. Y. 596; 47 N. E. 783, (land). *Contra:* Albea *v.* Griffin, 1838, 2 Dev. & Bat. Eq. (22 N. C.) 9, (land). For additional cases, *accord* and *contra*, see Browne, "Statute of Frauds," (5th ed.), § 448 *et seq.*; Wald's Pollock, "Contracts" (Williston's ed.), pp. 790–791.

[2] Cilley *v.* Burkholder, 1879, 41 Mich. 749; 3 N. W. 221; Johnson *v.* Puget Mill Co., 1902, 28 Wash. 515; 68 Pac. 867. And see Dowdle *v.* Camp, 1815, 12 Johns. (N. Y.) 451. But see, *contra:* Smith *v.* Rogers, 1886, 42 Hun (N. Y. Sup. Ct.) 110, (aff. 118 N. Y. 675; 23 N. E. 1146), and Whitaker *v.* Burrows, 1893, 71 Hun 478; 24 N. Y. Supp. 1011, holding that the purchaser is not prevented from sueing the vendor for restitution by the fact that he might enforce specific performance against a subsequent purchaser with knowledge.

Of course, where the doctrine that part performance or a change of

value of services rendered[1] under such circumstances may be recovered. But if a purchaser may elect to sue a vendor in default for restitution instead of for damages in the case of a written contract (*post*, § 262), it would seem that in fairness he should be permitted to sue him for restitution instead of for specific performance in the case of an oral contract within the statute but enforceable in equity.

Suppose that the vendor of land, after such part performance by the purchaser as makes the contract enforceable, but before the purchaser's right to specific performance matures, conveys to an innocent purchaser for value. In jurisdictions where, in such an event, the court of equity will award damages in lieu of specific performance,[2] the enforceability of his contract, in a broad sense, is not affected. But in jurisdictions where damages will not be awarded in case the plaintiff knows, when he commences suit, that by reason of a conveyance to an innocent purchaser he is not entitled to specific performance,[3] the purchaser's right to enforce the contract may be utterly lost. Upon such a showing, it seems probable that, at least in equity, restitution would be decreed.[4]

position in reliance upon the contract makes it enforceable in equity is rejected, this question cannot arise. See Rhea *v.* Allison, 1859, 3 Head (40 Tenn.) 176.

[1] Mahan *v.* Close, 1895, 63 Minn. 21; 65 N. W. 95. *Contra:* Reynolds *v.* Reynolds, 1902, 74 Vt. 463; 52 Atl. 1036, in which the court said (p. 466): "If there was an equitable relief also, it was for the benefit of the plaintiff, not of the defendant, who cannot insist that he should be compelled to do what he has been asked to do and has refused." See also Smith *v.* Hatch, 1865, 46 N. H. 146, where it was held that upon the refusal of the defendant to convey, the plaintiff could either enforce the contract or recover the value of land conveyed by him to the defendant.

[2] See Gupton *v.* Gupton, 1870, 47 Mo. 37; Pomeroy, "Specific Performance of Contracts" (2d ed.), § 478.

[3] See Milkman *v.* Ordway, 1870, 106 Mass. 232, 253; Pomeroy, "Specific Performance of Contracts" (2d ed.), § 477.

[4] See King *v.* Thompson, 1835, 9 Pet. (U. S.) 204; Johnston *v.* Glancy, 1835, 4 Blackf. (Ind.) 94; 28 Am. Dec. 45; Green *v.* Drummond, 1869, 31 Md. 71; 1 Am. Rep. 14; Capps *v.* Holt, 1859, 5 Jones' Eq. (58 N. C.) 153; Pomeroy, "Specific Performance of Contracts" (2d ed.), § 478.

§ 102. **Same: Improvements on land by purchaser or lessee.** — In most jurisdictions the improvement of land by the *purchaser* under an oral contract is an act which enables him to enforce the contract in equity.[1] Where this doctrine is accepted it may be thought unnecessary to raise an obligation on the part of the vendor to pay for the benefit resulting from such improvements,[2] except in the event of a subsequent conveyance to an innocent purchaser for value or of some other contingency that makes the remedy of specific performance unavailable.[3] On the other hand where the doctrine is rejected the purchaser would in every case be without a remedy unless such a quasi-contractual obligation were raised. The right to restitution has therefore been recognized,[4] though it is said not to be enforceable at law.[5] When it is the purchaser who is in default under the contract, it may not be inequitable for the vendor to retain the benefit derived by him from the improvement of his property.[6] But where the purchaser is willing to proceed

[1] See Browne, "Statute of Frauds" (5th ed.), § 487 and cases cited.

[2] Reynolds *v.* Johnston, 1854, 13 Tex. 214.

[3] McNamee *v.* Withers, 1872, 37 Md. 171; Welsh *v.* Welsh, 1832, 5 Ohio 425; Holthouse *v.* Rynd, 1893, 155 Pa. St. 43; 25 Atl. 760.

[4] Fox's Heirs *v.* Longly, 1818, 1 A. K. Marsh (8 Ky.) 388; Patterson *v.* Yeaton, 1859, 47 Me. 308, (Since the enactment of stat. 1874, c. 175, the contract may be specifically enforced. See Woodbury *v.* Gardner, 1885, 77 Me. 68.); Albea *v.* Griffin, 1838, 2 Dev. & Bat. Eq. (22 N. C.) 9; Luron *v.* Badham, 1900, 127 N. C. 96; 37 S. E. 143; Ford *v.* Stroud, 1909, 150 N. C. 362; 64 S. E. 1; Rhea *v.* Allison, 1859, 3 Head (40 Tenn.) 176; Treece *v.* Treece, 1880, 5 Lea (73 Tenn.) 220; Ernst *v.* Schmidt, 1912, Wash. ; 119 Pac. 828. And see Bender's Admrs. *v.* Bender, 1860, 37 Pa. St. 419.

The purchaser is also held to have a lien on the land for the amount recoverable by him. Brown *v.* East, 1827, 5. T. B. Mon. (21 Ky.) 405; McNamee *v.* Withers, 1872, 37 Md. 171; Treece *v.* Treece, 1880, 5 Lea (73 Tenn.) 220.

[5] Shreve *v.* Grimes, 1823, 4 Litt. (14 Ky.) 220; 14 Am. Dec. 117; Orear *v.* Botts, 1843, 3 B. Mon. (42 Ky.) 360; Patterson *v.* Yeaton, 1859, 47 Me. 308; Welsh *v.* Welsh, 1832, 5 Ohio 425; Mathews *v.* Davis, 1845, 6 Humph. (25 Tenn.) 324. For a criticism of some of these cases, see Keener, "Quasi-Contracts," pp. 366–371.

[6] Farnam *v.* Davis, 1855, 32 N. H. 302; Long *v.* Finger, 1876, 74 N. C. 502. And see Gillet *v.* Maynard, 1809, 5 Johns. (N. Y.) 85; 4 Am. Dec. 329. But see Hawkins *v.* Beal, 1836, 4 Dana (34 Ky.) 4, 6; Masson *v.*

and it is the vendor who makes default, the retention of such benefit is clearly unjust. The improvements are made, it is true, without the vendor's request and exclusively for the purchaser's benefit.[1] Furthermore the improvements may seem to the vendor neither profitable nor desirable. But the vendor has the option to perform his contract, which is morally, if not legally, binding upon him, and if he is unable or unwilling so to do, he ought at least to pay for the enhancement of the value of his property. The measure of recovery will be further considered in another section (*post*, § 107).

The case of improvements made by a *lessee* under an oral lease within the statute would seem to be governed by the same rules as that of improvements made by a purchaser. In the former case, however, it frequently appears that the improvements are made, not upon the lessee's initiative and exclusively for the lessee's benefit, but in pursuance of the provisions of the lease and as consideration, in whole or in part, for the lease. Improvements thus required of the lessee stand upon the same footing as other services rendered in performance of an oral contract within the statute, and the lessor cannot be heard to say that the improvements are of no benefit to him. It is held, consequently, that the lessee may recover at law the reasonable value of the labor and materials employed in making the betterments, regardless of their effect upon the value of the property.[2] Neither purchaser nor lessee may

Swan, 1871, 6 Heisk. (53 Tenn.) 450. In the former case the court said: "Had it clearly appeared that the non-execution of the contract was attributable altogether to his [the purchaser's] willful delinquency or fault, we should be indisposed to concede to him any right in equity to any compensation whatever."

[1] See Cook *v.* Doggett, 1861, 2 Allen (Mass.) 439; Smith *v.* Smith, 1860, 28 N. J. L. 208; 78 Am. Dec. 49; Gillet *v.* Maynard, 1809, 5 Johns. (N. Y.) 85; 4 Am. Dec. 329.

[2] Gray *v.* Hill, 1826, Ry. & M. 420; Pulbrook *v.* Lawes, 1876, 1 Q. B. D. 284; Findley *v.* Wilson, 1823, 3 Litt. (13 Ky.) 390; 14 Am. Dec. 72; White *v.* Wieland, 1872, 109 Mass. 291; Parker *v.* Tainter, 1877, 123 Mass. 185, (the court in this case said that the *cost* of the improvements might be recovered); Smith *v.* Smith, 1860, 28 N. J. L. 208; 78 Am. Dec. 49.

recover for improvements if it appears that notwithstanding the defendant's refusal to perform the contract the plaintiff remains in possession of the land.[1]

§ 103. (V) **Enforcement of restitution not against policy: Admissibility of parol evidence of contract.** — While the Statute of Frauds is in some jurisdictions regarded as completely nullifying contracts not conforming to its requirements (*ante*, § 93), it is nowhere held that such contracts are *illegal* — that is to say, that the making or performance of such a contract is an act in violation of law.[2] There appears to be no reason of policy, therefore, for denying to a party thereto, in a proper case, the aid of the court in obtaining quasi contractual relief, or the right to establish the justice of his quasi contractual demand by proving the terms of the unenforceable agreement. True, the evidence of the agreement, in such a case, must be oral; but since the evidence is for the purpose of proving, not a contract as such, but a transaction resulting in an unjust benefit to the defendant, its introduction would seem not to contravene the statute.[3]

[1] Miller *v.* Tobie, 1860, 41 N. H. 84, (purchaser); Yates *v.* Bachley, 1873, 33 Wis. 185.

[2] See Abbott *v.* Draper, 1847, 4 Den. (N. Y.) 51; Collier *v.* Coates, 1854, 17 Barb. (N. Y.) 471; Hawley *v.* Moody, 1852, 24 Vt. 603.

[3] Gay *v.* Mooney, 1901, 67 N. J. L. 27, 28 ; 50 Atl. 596. Action to recover compensation for board and lodging of plaintiff's wife's uncle who resided with plaintiff's family. Dixon, J.: "In order to rebut a presumption that the service was rendered and received as a gratuity, the plaintiff put in evidence tending to show an understanding between himself and the deceased that the latter would devise a certain dwelling to the plaintiff's children in return for what he should receive as a member of the family. For such a purpose this evidence was plainly legitimate. . . . Although the bargain between the plaintiff and the intestate contemplated payment to be made to the plaintiff's children, and not directly to himself, yet, as that bargain did not take the form of an actionable contract, it falls out of view as a ground of legal remedy, and appears only to give color to the conduct of the parties in furnishing and accepting the service rendered. It affords the means of determining that the service was not a gift, but a sale, and out of that determination the law deduces a right in him who sold the service to be paid its value by him who bought it."

Accord: Pulbrook *v.* Lawes, 1876, 1 Q. B. D. 284; Frazer *v.* Howe, 1883, 106 Ill. 563; Kettry *v.* Thumma, 1894, 9 Ind. App. 498; 36 N. E.

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§ 104. (VI) **Measure of recovery: Contract as evidence of value.** — Since the obligation under discussion is essentially an obligation to restore a benefit received and not to compensate for an injury inflicted, the value of the benefit to the defendant, and not the cost of the plaintiff's performance or the extent of the plaintiff's loss or damage as a result of the defendant's default, is the measure of the plaintiff's recovery:

Dowling v. *McKenney*, 1878, 124 Mass. 478: Count for ten days' labor on a monument and three days' services in preparing land and foundation for same. The labor and services were performed under an oral contract by which the defendant was to convey to the plaintiff a lot of land, and to take in payment a monument, when completed, and the balance in money. The plaintiff completed the monument, but the defendant repudiated the contract and refused to take the monument. ENDICOTT, J. (p. 481): "In the case at bar, the defendant received no benefit from the labor performed in completing the monument, although the plaintiff may have suffered a loss because he is unable to enforce his contract, and no recovery can be had for the labor on the monument, as charged in the account annexed to the third count.

"But this rule does not apply to the item for services performed by the plaintiff in preparing the land and foundation. If this refers to the lot of the defendant where the monument was to stand, and the work was done upon it, we cannot say as a matter of law that it was not of benefit to defendant."[1]

It follows that if the defendant has derived no benefit whatever from the plaintiff's performance the plaintiff has no cause of action. Thus, where a son worked for his father on the father's farm under an unenforceable contract with his uncle, it was

919; Flowers *v.* Poorman, 1909, 43 Ind. App. 528; 87 N. E. 1107; *In re* Williams' Estate, 1895, 106 Mich. 490; 64 N. W. 490; Estate of Kessler, 1894, 87 Wis. 660; 59 N. W. 129; 41 Am. St. Rep. 74; Taylor *v.* Thieman, 1907, 132 Wis. 38; 111 N. W. 229; 122 Am. St. Rep. 943.

[1] Also: Fuller *v.* Reed, 1869, 38 Cal. 99; Riiff *v.* Riibe, 1903, 68 Neb. 543; 94 N. W. 517; Galvin *v.* Prentice, 1871, 45 N. Y. 162; 6 Am. Rep. 58; Hertzog. *v.* Hertzog's Admr. 1859, 34 Pa. St. 418; Masson *v.* Swan, 1871, 6 Heisk. (53 Tenn.) 450; Pierce *v.* Paine, 1855, 28 Vt. 34.

held that the uncle was under no quasi contractual obligation to pay the value of such services, since he had derived no benefit from them.[1] For the same reason one who, in reliance upon an unenforceable contract, constructed a wood-chopping machine which was not accepted, was denied a recovery for the value of the labor and materials employed.[2]

It follows, likewise, that in the case of services rendered or property transferred the amount of recovery is not governed by the contract price.[3] There are authorities to the contrary,[4] but they rest, apparently, upon the theory that in so far as a contract within the statute has been performed by one party before its repudiation by the other, it may be enforced according to its terms. The obligation, in such cases, can hardly be said to be quasi contractual.

Where the value of the plaintiff's performance exceeds the contract price, he may realize, it is true, returns larger than he contemplated when entering into the contract. If it is the *defendant* who has refused to perform the contract, no injustice results. The defendant suffers no loss, and moreover, if the plaintiff's recovery were limited to the contract rate the defendant might actually profit by the contract which he

[1] Bristol *v.* Sutton, 1897, 115 Mich. 365: 73 N. W. 424.

[2] Banker *v.* Henderson, 1895, 58 N. J. L. 26; 32 Atl. 700. See also Cocheco Aqueduct *v.* Boston, etc., R. Co., 1879, 59 N. H. 312.

[3] William, etc., Works *v.* Atkinson, 1873, 68 Ill. 421; 18 Am. Rep. 560; Schanzenbach *v.* Brough, 1895, 58 Ill. App. 526; Stout's Admr. *v.* Royston, 1908, 32 Ky. Law Rep. 1055; 107 S. W. 784; Emery *v.* Smith, 1865, 46 N. H. 151; Hertzog *v.* Hertzog's Admr. 1859, 34 Pa. St. 418. See Fuller *v.* Reed, 1869, 38 Cal. 99; Erben *v.* Lorillard, 1859, 19 N. Y. 299.

[4] Murphy *v.* De Haan, 1902, 116 Ia. 61; 89 N. W. 100; Sears *v.* Ohlen, 1911, 144 Ky. 473; 139 S. W. 759; Fuller *v.* Rice, 1884, 52 Mich. 435; 18 N. W. 204; Spinney *v.* Hill, 1900, 81 Minn. 316; 84 N. W. 116; Lally *v.* Crookston Lumber Co., 1902, 85 Minn. 257; 88 N. W. 846. And see Darknell *v.* Cœur D'Alene, etc., Trans. Co., 1910, 18 Ida. 61; 108 Pac. 536. In Spinney *v.* Hill, *supra*, the court said (p. 322): "We are compelled to admit that the reasoning on which the doctrine is based is not satisfactory, and has often been criticized as illogical, because, although the statute denounces such agreements and deprives them of all legal validity, the doctrine itself validates them to some extent, and measures some of the rights of the parties by them."

refuses to perform. If, on the other hand, it is the *plaintiff* who is in default, the contract price should ordinarily be the limit of his recovery — assuming, of course, that he should be allowed to recover at all. Otherwise he might profit by his default.[1] Even in the case of a plaintiff in default, however, if before defaulting he endeavors to have the oral contract reduced to writing and the defendant refuses so to do, the recovery of the full value of his performance, even if it exceeds the contract price, would seem to be unobjectionable. For while technically it is the plaintiff who defaults, the blame attaches exclusively to the defendant.

While the unenforceable contract does not afford the true criterion for determining the value of services rendered or property transferred, it ordinarily does show the amount of money the plaintiff once declared himself willing to take and which the defendant once agreed to pay. It should therefore be admitted, at the instance of either party, in the character not of a contract but of an admission against interest, for the purpose of establishing the value of such services or property. It has been contended in some cases that to permit the introduction of the terms of the contract for the purpose of assisting the plaintiff in any way is to defeat or circumvent the statute.[2] This attitude, if consistently assumed, would prevent the proof of the contract even for the purpose of showing that the services rendered by the plaintiff were not intended to be gratuitous. It is clearly untenable. Reasonably interpreted, the statute applies only to the enforcement of oral *con-*

[1] See Keener, "Quasi-Contracts," p. 313 n.

[2] See McElroy *v.* Ludlum, 1880, 32 N. J. Eq. 828, 837, in which DEPUE, J., said: "The policy of the statute is to prevent frauds which may be accomplished by setting up contracts of the interdicted class, by parol testimony. That policy is infringed upon equally, whether the contract be used for the purpose of influencing the amount of the recovery, or be made the foundation of the action." Also, Sutton *v.* Rowley, 1880, 44 Mich. 112, 113; 6 N. W. 216; in which CAMPBELL, J., said: "There being nothing in the record to indicate that the agreement differs from any other parol agreement concerning lands, it was void and cannot be considered in measuring the damages or for any other purpose."

tracts. It does not relate to oral admissions against interest. If, then, the same transaction happens to amount to both an oral contract and an oral admission, the unenforceability or invalidity of the contract should not affect the competency of the admission as evidence of a non-contractual obligation.[1]

Care must be exercised, however, in using a rate of compensation fixed in anticipation of *full* performance, for the purpose of estimating the value of *part* performance. Not infrequently the several parts or units of an undertaking are of unequal value, and the contract rate is evidence, not of the value of each unit, but of the average value of all. This is nicely illustrated in the New York case of *Galvin* v. *Prentice*,[2] where the plaintiff sought to recover for services rendered under an oral contract to pay him certain weekly wages for three years. The trial court charged the jury that the contract, although void, might be considered *prima facie* evidence of the value of the services, but the Court of Appeals, after pointing out that it appeared that the plaintiff was ignorant of the business when he entered upon the performance of the contract, said: "It cannot be supposed that his work was of the same value during the prior part of the term of his employment, as it would be during the latter part, when his proficiency must materially have increased. The price agreed upon for three years, was not, therefore, competent evidence of the value of the services during the first and second years."

[1] Scarisbrick *v.* Parkinson, 1869, 20 L. T. 175; Clark *v.* Terry, 1856, 25 Conn. 395; Giles *v.* McEwan, 1896, 11 Manitoba 150; Whipple *v.* Parker, 1874, 29 Mich. 369; Moore *v.* Capewell Horse-Nail Co., 1889, 76 Mich. 606; 43 N. W. 644. And see Galvin *v.* Prentice, 1871, 45 N. Y. 162; 6 Am. Rep. 58. But see, *contra*, Sutton *v.* Rowley, 1880, 44 Mich. 112; 6 N. W. 216; Emery *v.* Smith, 1865, 46 N. H. 151; Erben *v.* Lorillard, 1859, 19 N. Y. 299, 302. In Clark *v.* Terry, *supra*, HINMAN, J., said (p. 401): "In respect to the question whether wages have been earned, which ought to be paid for, and if so to what extent or amount, and when the payment ought to be made, it appears to us that all the circumstances under which they are claimed to have been earned, including the contract under which the service was performed, although it may be one that cannot be enforced by any action directly upon it, may and ought to be considered."

[2] 1871, 45 N. Y. 162, 164; 6 Am. Rep. 58.

Another illustration of the same point is afforded by the Massachusetts case of *Williams* v. *Bemis*.[1] The plaintiff was to cultivate the defendant's land for two years for a share of the crops, but at the end of the first year the defendant paid to the plaintiff his share of that year's crop and refused to let him cultivate the land for the second year. Upon showing that, as was understood and anticipated, the work and materials furnished by the plaintiff during the first year were of greater value than the plaintiff's share of that year's crops and inured to the benefit of the crop for the second year, the plaintiff was permitted to recover the value of such work and materials in excess of the amount already received by him.

§ 105. **Same: May value of thing promised by defendant be proved?** — If the defendant promises to pay a certain sum of money for the plaintiff's performance, the terms of the promise may be shown, as has been seen (*ante*, § 104), as an admission of the value of the plaintiff's performance. If the defendant's promise is not to pay a certain sum of money, but to transfer property or render services, may the value of such property or services be shown? In the case of a contract for the *exchange* of the plaintiff's land for the defendant's, testimony as to the value of the defendant's land has been held admissible, as constituting, together with the contract, a "practical admission" that the property conveyed by the plaintiff was worth that amount.[2] But in the case of *services* rendered by the plaintiff in consideration of a promise to convey land or deliver goods, the weight of authority is that the value of the property may not be shown.[3] Where it appears that at the time the contract was made the extent of the services to be rendered was specu-

[1] 1871, 108 Mass. 91; 11 Am. Rep. 318.

[2] Bassett *v.* Bassett, 1867, 55 Me. 127.

[3] Fuller *v.* Reed, 1869, 38 Cal. 99; Hillebrands *v.* Nibbelink, 1879, 40 Mich. 646; Ham. *v.* Goodrich, 1858, 37 N. H. 185; Erben *v.* Lorillard, 1859, 19 N. Y. 299, (disapproving dictum in King *v.* Brown, 1842, 2 Hill (N. Y.) 485); Hertzog *v.* Hertzog's Admr., 1859, 34 Pa. St. 418, (overruling earlier cases); Ewing *v.* Thompson, 1870, 66 Pa. St. 382. But see Bonnon's Estate *v.* Urton, 1851, 3 G. Greene (Ia.) 228; Carter *v.* Brown, 1871, 3 S. C. 298.

lative — as, for example, where one was to serve another until the latter's death — this ruling is unquestionably sound. In such circumstances the promise of the defendant involves no admission of the value of the plaintiff's services. But where it appears that the extent of the services to be rendered was known when the contract was entered into, the propriety of rejecting such evidence may be doubted. The contract is certainly an admission that the plaintiff's services were worth the defendant's property, and testimony as to the value of the defendant's property is essential to the interpretation of that admission in terms of money.

Where it appears that at the time the contract was made the thing promised by the defendant was of unknown value — as where he promised a percentage of the profits that might be made in a business — testimony as to its value, as subsequently ascertained, may properly be excluded.[1] In such a case, as in that where the extent of the services to be rendered by the plaintiff was unknown, it cannot be said that the contract contains any admission as to the value of the plaintiff's performance.

§ 106. **Same: Deduction of benefit received by plaintiff.** — In order that the judgment may not enrich the plaintiff at the defendant's expense, the value of any benefit received by the plaintiff from the defendant must be deducted from the value of that conferred by the plaintiff upon the defendant:

Richards v. *Allen*, 1840, 17 Me. 296: Oral contract to purchase land. WESTON, C.J. (p. 300): "But the plaintiff's claim must be limited to what is just and reasonable under all the circumstances. He had made some payments; but he had enjoyed the farm for eighteen or twenty years. The jury should have been permitted to take this into consideration, even without an account in offset, as it was necessarily connected with the plaintiff's claim, and was of a character to affect and qualify it."

Ham v. *Goodrich*, 1858, 37 N. H. 185: Services rendered under

[1] McElroy *v.* Ludlum, 1880, 32 N. J. Eq. 828. But see La Du-King Mfg. Co. *v.* La Du, 1887, 36 Minn. 473, 31 N. W. 938.

an oral contract that the defendant should convey a farm to the plaintiff. EASTMAN, J. (p. 190): "The recovery of the plaintiff being founded upon the general counts, and upon them alone, the instructions of the court that what he received from the farm as he went along might be applied in payment for his services, were correct. What did he reasonably deserve to have, under all the circumstances, was the question."

Day v. *N. Y., etc., R. Co.*, 1873, 51 N. Y. 583: Oral contract by which in consideration of the conveyance of land by the plaintiff, the defendant was to give to the plaintiff the business of keeping and feeding stock transported. The defendant gave the business to the plaintiff for a time, and then made default. EARL, C. (p. 592): "The defendant having repudiated the agreement, the plaintiff can recover for his land as if there had been no agreement as to the amount of the consideration, but he must allow so much of the consideration as has been paid; and if he received more in the profits of the business which the defendant brought him under the agreement than the value of his land, he can recover nothing. If the profits are less than the value of the land, then he can recover the balance.

"It was not necessary for the plaintiff to tender the profits to the defendant before the commencement of the action." [1]

The propriety of deducting the value of the purchaser's use and occupation, in cases like *Richards* v. *Allen, supra,* has been questioned.[2] If the payments made by the purchaser, it is suggested, are made in exchange exclusively for the conveyance of title by the vendor, and not in part for the prior transfer of possession, the plaintiff's use and occupation is not a benefit conferred by the vendor in performance of his contract and in return for the benefit received from the purchaser. But the transfer of possession would seem to be an act in re-

[1] Also: Collins *v.* Thayer, 1874, 74 Ill. 138; McCracken *v.* Sanders, 1817, 4 Bibb (7 Ky.) 511; Chapman *v.* Rich, 1874, 63 Me. 588; Dix *v.* Marcy, 1875, 116 Mass. 146; Miller *v.* Roberts, 1897, 169 Mass. 134; 47 N. E. 585; Masson *v.* Swan, 1871, 6 Heisk, (53 Tenn.) 450. See Harkness *v.* McIntire, 1884, 76 Me. 201; Todd *v.* Bettingen, 1910, 109 Minn. 493; 124 N. W. 443; Graham *v.* Graham, 1909, 134 App. Div. 777; 119 N. Y. Supp. 1013.

[2] Keener, "Quasi-Contracts," pp. 283–4.

liance upon the contract, if not in the performance of it. The vendor is for that reason allowed to recover for use and occupation against a purchaser in default (*ante*, § 97). It follows that where the vendor is in default he is entitled to a deduction of the value of such use and occupation from the value of any benefit received by him.

§ 107. **Same: Improvements on land.** — As has already been pointed out (*ante*, § 102), in the case of improvements made by the purchaser or lessee of land at his own instance and for his own benefit, the seller or lessor is liable, if at all, only to the extent of the enhancement of the value of the land,[1] while in the case of improvements made by the lessee in pursuance of the requirements of his lease the lessor may be held for the value of the labor and materials expended in making the improvements, whether or not the land is enhanced in value.[2] The reason for the difference is plain. In the former case it cannot fairly be assumed that the owner of the land desired the improvements or that they are beneficial to him except as they have increased the market value of his property. In the latter, since he has required the lessee to expend the labor and materials, he cannot justly deny that he is benefited to the extent of their reasonable value.

Where the enhancement in the value of the land constitutes the measure of recovery it should be estimated as of the time of the surrender of the premises,[3] and the cost of making the improvements is legitimate evidence as to the extent of the enhancement.[4]

In every case, whether it is the value of the improvements or merely the enhancement in the value of the land that may be

[1] Ford *v.* Stroud, 1909, 150 N. C. 362; 64 S. E. 1; Matthews *v.* Davis, 1845, 6 Hump. (25 Tenn.) 324; Rhea *v.* Allison, 1859, 3 Head (40 Tenn.) 176; Masson *v.* Swan, 1871, 6 Heisk. (53 Tenn.) 450. And see Glass *v.* Hampton, 1909, 122 S. W. 803, (Ky.).

[2] Pulbrook *v.* Lawes, 1876, 1 Q. B. D. 284; Smith *v.* Smith, 1860, 28 N. J. L. 208; 78 Am. Dec. 49. And see cases cited *ante*, § 102.

[3] Treece *v.* Treece, 1880, 5 Lea (73 Tenn.) 220. See Masson *v.* Swan, 1871, 6 Heisk. (53 Tenn.) 450.

[4] Masson *v.* Swan, 1871, 6 Heisk. (53 Tenn.), 450.

recovered, the value of the benefit derived by the plaintiff from the use and occupation of the premises must of course be deducted.[1] It is sometimes said that the plaintiff's *profits* must be deducted,[2] but since the occupation is with the consent of the owner the reasonable value of the land would seem to be the true criterion.

§ 108. (VII) **Necessity of demand: Statute of limitations: Interest.** — If one who is himself in default under a contract within the statute is to be permitted under any circumstances to recover the value of his part performance from one who is ready and willing to perform, a demand should certainly be required before suit brought (*ante*, § 32).[3] On the other hand, where the action is brought by one who is willing to proceed with performance against one who fails or refuses to carry out his engagement, a demand is obviously unnecessary (*ante*, § 32). In such a case the obligation arises when default occurs [4] and the statute of limitations runs from that time.[5]

If money or property received under a contract unenforceable because of the statute is *used* by the recipient, the value of such use is a part of the benefit that ought to be restored. And, without regard to the question of *use*, interest on the value of the benefit received should always be allowed from the date of the inception of the obligation, as damages for the failure promptly to perform it (see *ante*,

[1] McCracken *v.* Sanders, 1817, 4 Bibb (7 Ky.) 511; Ford *v.* Stroud, 1909, 150 N. C. 362; 64 S. E. 1; Treece *v.* Treece, 1880, 5 Lea (73 Tenn.) 220; Clark *v.* Davidson, 1881, 52 Wis. 317; 10 N. W. 384. In Fox's Heirs *v.* Longly, 1818, 1 A. K. Marsh. (8 Ky.) 388, it was erroneously said that the plaintiff was accountable for rents until there was a denial of his right or an assertion of title by the vendor.

[2] See Ford *v.* Stroud, 1909, 150 N. C. 362; 64 S. E. 1.

[3] Abbott *v.* Draper, 1847, 4 Denio (N. Y.) 51; Marsh *v.* Wyckoff, 1863, 10 Bosw. (N. Y. Superior Ct.) 202; Tucker *v.* Grover, [First Case] 1884, 60 Wis. 233; 19 N. W. 92.

[4] Frey *v.* Stangl, 1910, 148 Ia. 522; 125 N. W. 868, 870. *Contra:* Tucker *v.* Grover, [Second Case] 1884, 60 Wis. 240; 19 N. W. 62.

[5] Collins *v.* Thayer, 1874, 74 Ill. 138; Lyttle *v.* Davidson, 1902, 23 Ky. Law Rep. 2262; 67 S. W. 34; Richards *v.* Allen, 1840, 17 Me. 296; Estate of Kessler, 1894, 87 Wis. 660; 59 N. W. 129; 41 Am. St. Rep. 74.

§ 34). Apparently without recognizing the distinction between interest as a part of the principal obligation, and interest as damages, it has been held that interest on money paid may be recovered from the date of its payment.[1] As to interest on benefits other than money, it was held, in a case of a claim for money paid and services rendered, that interest was recoverable only from the date of the commencement of the action;[2] and, in a case of property conveyed, that interest was not recoverable at all.[3]

[1] Reid *v.* Reid, 1911, 141 Ky. 402; 133 S. W. 219, (but see Padgett *v.* Decter, 1911, 145 Ky. 227; 140 S. W. 152, allowing interest from beginning of action to eject plaintiff); Winters *v.* Elliot, 1878, 1 Lea (69 Tenn.) 676; Smoot *v.* Smoot, 1883, 12 Lea (80 Tenn.) 274; Vaughn *v.* Vaughn, 1898, 100 Tenn. 282; 45 S. W. 677.

[2] Tucker *v.* Grover, [Second Case] 1884, 60 Wis. 240; 19 N. W. 62.

[3] Day *v.* New York &c. Ry. Co., 1880, 22 Hun (N. Y. Sup. Ct.) 412.

CHAPTER VII

MISRELIANCE ON CONTRACT UNENFORCEABLE BECAUSE OF IMPOSSIBILITY OF PERFORMANCE

§ 109. In general.
§ 110. Non-enforceability may result from prevention: (1) of plaintiff's performance, or (2) of defendant's performance.
§ 111. (I) Plaintiff's performance prevented: In general.
§ 112. (1) Misreliance on contract: Assumption of risk.
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§ 114. Same: Effect of express stipulation.
§ 115. (2) Receipt of benefit by defendant.
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§ 119. (*b*) Destruction of personalty in course of alteration or repair.
§ 120. (*c*) Loss of goods in course of carriage: Disablement of carrying vessel.
§ 121. (*d*) Loss of vessel in course of seaman's service.
§ 122. (*e*) Illness or death of contractor.
§ 123. Same: Limitation of rule.
§ 124. (*f*) Act of government.
§ 125. (3) Measure of recovery.
§ 126. Same: In case of insurance contracts.
§ 127. (II) Defendant's performance prevented: In general.
§ 128. (1) Recovery of prepaid purchase price of goods or land.
§ 129. (2) Recovery of prepaid freight.
§ 130. (3) Enforcement of restitution impracticable: Part payment of unapportionable consideration.
§ 131. (4) Enforcement of restitution inequitable: Change of position.

§ 109. **In general.** — Strictly speaking, a contract is not discharged by reason of being or becoming impossible of performance. But not infrequently a contract which in terms is unconditional is in substance and effect subject to a condition which protects the contractor against a contingency which

makes performance impossible.[1] In other words, the contract is so construed, by reading an implied condition into it, as to excuse the contractor from his obligation under the particular circumstances which make performance impossible. The scope of this chapter is confined to cases in which a benefit is conferred in reliance upon a contract the failure to perform which is so excused.

§ 110. **Non-enforceability may result from prevention: (1) of plaintiff's performance, or (2) of defendant's performance.** — The cases in which quasi contractual obligation may be claimed to result from the impossibility of performing a contract obviously fall into two classes: — first, those in which the *plaintiff* is prevented from completing the performance of a condition precedent to the defendant's contractual liability and therefore cannot recover in a contractual action; and second, those in which the *defendant* is prevented from performing, but because of an implied or constructive condition excusing his default, cannot be held for a breach. The two classes of cases will be separately considered.

§ 111. (I) **Plaintiff's performance prevented: In general.** — While, as has been explained, the cases falling within the scope of this chapter are those in which the default does not constitute a breach, nevertheless, a failure to perform a condition effectually bars a recovery on the contract. If, however, the plaintiff in misreliance upon the contract has by part performance conferred a benefit upon the defendant, he is entitled to restitution.

§ 112. (1) **Misreliance on contract: Assumption of risk.** — The English courts, in the cases now under consideration, as in the cases where one who has committed a breach of contract seeks to recover the value of part performance (*post*, § 164),

[1] The phrase "impossibility of performance," as commonly used, includes some cases in which performance is not physically impossible, but is excused because of unanticipated danger to the contractor, governmental prohibition, or other extraordinary after-event which would make the enforcement of the contract unfair. See *post*, §§ 122, 124.

refuse to recognize a quasi contractual obligation.[1] The precise reason for this attitude is nowhere satisfactorily expressed; but it seems to be that if a quasi contractual obligation were recognized, the plaintiff would be allowed to recover compensation for his part performance in the face of his own agreement that for part performance he should receive nothing.[2] In other words, the plaintiff is thought to have voluntarily assumed the risk of failure, for *any* reason, to perform in full. And a voluntary assumption of risk, as heretofore explained (*ante*, § 16), is incompatible with misreliance.

Where the contract contains an express stipulation that in case of the failure of the plaintiff to perform it in full he shall be entitled to *no compensation whatever*, the view that he assumed the risk appears, with a limitation hereafter to be stated (*post* § 114), to be sound. But to presume, in the absence of such an express stipulation, that the plaintiff assumed the risk of an event so extraordinary that it excuses him from liability for failure to perform his engagement, seems illogical and unjust. The fair presumption, in such a case, it is submitted, is that the risk of a default resulting from impossibility was not assumed and that the plaintiff relied upon a contract right which, because of his excusable default, became unavailable.

§ 113. **Same: Presumption rebuttable.** — If the presumption is indulged that the risk of default resulting from impossibility is not assumed by the plaintiff, it should be rebuttable by proof

[1] Appleby *v.* Dods, 1807, 8 East 300, (services of seamen on vessel lost); Appleby *v.* Myers, 1867, L. R. 2 C. P. 651, (work on premises destroyed by fire); Anglo-Egyptian Navigation Co. *v.* Rennie, 1875, L. R. 10 C. P. 271, (repairs on vessel lost before completion); The Madras [1898], P. 90, (towing of vessel before she stranded); King *v.* Low, 1902, 3 Ont. L. R. 234, (work on dwelling destroyed by fire).

[2] Professor Keener, in his treatise on "Quasi-Contracts," expresses it as follows (p. 222): "It would seem to be a clear usurpation on the part of a court to say that a plaintiff shall recover compensation from a defendant in circumstances in which both the plaintiff and the defendant have agreed that the plaintiff should have no compensation, and yet, if a plaintiff who has failed to perform a true condition in the contract is allowed to exact compensation from the defendant in quasi-contract, when the failure would prevent his recovering on the contract itself, a court is practicing such usurpation."

that the purpose of the condition precedent requiring complete performance before payment included the protection of the defendant against any liability whatever in case of impossibility of performance by the plaintiff. This was true in the much discussed English case of *Cutter* v. *Powell*, although under the English doctrine the plaintiff would not, in any event, have been permitted to recover:

Cutter, Admx. of Cutter v. *Powell*, 1795, 6 Term R. 320: Assumpsit for work and labor of intestate as second mate of a vessel on a voyage from Kingston to Liverpool. The defendant engaged in writing "to pay to Mr. T. Cutter the sum of thirty guineas, provided he proceeds, continues, and does his duty as second mate in the said ship from hence to the port of Liverpool." Cutter died during the voyage. It appeared that the usual wages of a second mate on such a voyage, when shipped by the month out and home, were four pounds per month.

Lord KENYON, C.J. (p. 324): ". . . here the defendant contracted to pay thirty guineas provided the mate continued to do his duty as mate during the whole voyage, in which case the latter would have received nearly four times as much as if he were paid for the number of months he served. He stipulated to receive the larger sum if the whole duty were performed and nothing unless the whole of that duty were performed; it was a kind of insurance."

GROSE, J. (p. 326): "And when we recollect how large a price was to be given in the event of the mate continuing on board during the whole voyage instead of the small sum which is usually given per month, it may fairly be considered that the parties themselves understood that if the whole duty were performed, the mate was to receive the whole sum, and that he was not to receive anything unless he did continue on board during the whole voyage. That seems to me to be the situation in which the mate chose to put himself; and as the condition was not complied with, his representative cannot now recover anything."

It is clear that Cutter's failure to complete the voyage would not have been held a breach, for assuming that he promised to

complete it the promise would have been construed to contain an implied exception excusing his estate from liability in case of his death. But since the extraordinary wages agreed to be paid by the defendant satisfied the court that the parties intended that the plaintiff should receive nothing in case of failure from *any* cause, it was properly held that, in respect of compensation for his services, the plaintiff assumed the risk of default resulting from impossibility, and therefore could not fairly seek compensation for his part performance.

§ 114. **Same: Effect of express stipulation.** — Where the contract contains an express stipulation to the effect that in case of the failure of the plaintiff to complete performance he shall be entitled to no compensation whatever, it seems fair to presume that the risk of failure from any cause was assumed by the plaintiff. Even in such a case, however, it would seem that he ought to be permitted to overcome the presumption and recover the value of his part performance by showing, not merely that his default was due to impossibility, but that the contingency which made performance impossible was one against which the stipulation was not intended to protect the defendant.

The case of *Appleby* v. *Dods*[1] illustrates the point. This was an action by a seaman to recover *pro rata* wages, the homeward voyage not having been completed because the vessel was lost at sea, and Lord ELLENBOROUGH, in the course of his opinion, said:[2]

"The terms of the contract in question are quite clear and reasonable: they relate to a voyage out to Madeira and any of the West India islands, and to return to London; and there is an express stipulation 'that no seaman shall demand or be entitled to his wages, or any part thereof, until the arrival of the ship at the above mentioned port of discharge,' etc.; which must refer to London. And though the reason of this stipulation was, no doubt, to oblige the mariners to return home with the ship, and not to desert her in the West Indies; yet the terms of it are general, and include the present case: and we cannot say, against the express contract of the parties, that the seaman

[1] 1807, 8 East 300.
[2] At page 303.

shall recover pro rata, although the ship never did reach her port of discharge named."

Now, had it been *proved*, instead of assumed, that the sole purpose of the express stipulation quoted was to protect the defendant against desertion, the court would have been obliged, upon principle, to hold that the plaintiff had not assumed the risk of impossibility resulting from the loss of the ship, and consequently was entitled to the value of his part performance.[1]

§ 115. (2) **Receipt of benefit by defendant.** — The element of quasi contractual obligation most frequently declared to be wanting in the class of cases under consideration in this chapter, is that of the receipt of a benefit by the defendant as a result of the plaintiff's part performance. For the sake of clearness several groups of cases in which this question has been raised will be considered separately.

§ 116. (*a*) **Destruction of building in course of improvement.** — It has been held in a number of cases that one who is prevented from completing the performance of a contract to alter, decorate, repair, or contribute to the construction of a building, by the destruction of the building, cannot recover for the labor and materials expended in part performance.[2] Doubtless one

[1] See Keener, "Quasi-Contracts," p. 250, in which it is forcefully argued that the introduction of evidence to show that a condition inserted in a contract was inserted to meet a contingency which has not arisen is not a violation of the so-called parol evidence rule. "Whether this evidence should be allowed or not," says Professor Keener, "would seem to depend upon the purpose for which it is offered. If it is offered for the purpose of varying the terms of a contract, and to enable the person to recover on the contract itself, the evidence should not be admitted, for the reason that it would convert what is in form a conditional promise into an absolute promise. But when the plaintiff concedes that the promise is a conditional promise, and that therefore he cannot recover upon that promise, and offers the evidence, not for the purpose of claiming rights under the contract, but for the purpose of showing that a recovery by him would not violate any intention that existed in the mind of either himself or the defendant at the time when the contract was made, such evidence it is submitted is not open to the objection of varying a written instrument by parol evidence."

[2] Appleby *v.* Myers, 1867, L. R. 2 C. P. 651; Siegel, Cooper & Co. *v.* Eaton & Prince Co., 1897, 165 Ill. 550; 46 N. E. 449; Huyett Mfg. Co. *v.* Chicago Edison Co., 1897, 167 Ill. 233; 47 N. E. 384; 59 Am. St.

of the reasons for so holding — not always made clear in the cases — is the notion that the destruction of the building before complete performance prevents the defendant from reaping any benefit from part performance. The weight of American authority, however, permits a recovery,[1] though in some of the cases upon the theory of a genuine implied agreement by the owner of the building to pay *pro rata* for the actual performance of the work in case the building is destroyed. The quasi contractual basis of recovery is well expressed in the following decisions:

Young v. *City of Chicopee*, 1904, 186 Mass. 518; 72 N. E. 63: Action to recover for work and materials furnished under a contract for the repair of a bridge. During the progress of the work, the bridge was totally destroyed. The only question

Rep. 272; Krause *v.* Board of Trustees, 1904, 162 Ind. 278; 70 N. E. 264; 65 L. R. A. 111; 102 Am. St. Rep. 203; Taulbee *v.* McCarty, 1911, 144 Ky. 199; 137 S. W. 1045; King *v.* Low, 1902, 3 Ont. L. R. 234. And see Brumby *v.* Smith, 1841, 3 Ala. 123; Clark *v.* Collier, 1893, 100 Cal. 256; 34 Pac. 677; Louisville Foundry, etc., Co. *v.* Patterson, 1906, 29 Ky. Law Rep. 349; 93 S. W. 22; Fairbanks *v.* Richardson Drug Co., 1890, 42 Mo. App. 262; Pike Electric Co. *v.* Richardson Drug Co., 1890, 42 Mo. App. 272.

[1] Cleary *v.* Sohier, 1876, 120 Mass. 210; Butterfield *v.* Byron, 1891, 153 Mass. 517; 27 N. E. 667; 12 L. R. A. 571; 25 Am. St. Rep. 654; Young *v.* City of Chicopee, 1904, 186 Mass. 518; 72 N. E. 63; Angus *v.* Scully, 1900, 176 Mass. 357; 57 N. E. 674; 49 L. R. A. 562; 79 Am. St. Rep. 318; Ganong & Chenoweth *v.* Brown, 1906, 88 Miss. 53; 40 So. 556; 117 Am. St. Rep. 731; Haynes, Spencer and Co. *v.* Second Baptist Church, 1882, 12 Mo. App. 536, (*aff.* 1885, 88 Mo. 285; 57 Am. Rep. 413; but see Fairbanks *v.* Richardson Drug Co., 1890, 42 Mo. App. 262; Pike Electric Co. *v.* Richardson Drug Co., 1890, 42 Mo. App. 272); Dame *v.* Woods, 1908, 75 N. H. 38; 70 Atl. 1081, (*cf.* same *v.* same, 1905, 73 N. H. 222; 60 Atl. 744; 70 L. R. A. 133); Niblo *v.* Binsse, 1864, 3 Abb. App. Dec. (N. Y.) 375; Hayes *v.* Gross, 1896, 9 App. Div. 12; 40 N. Y. Supp. 1098, (*aff.* 1900, 162 N. Y. 610; 57 N. E. 1112); Hollis *v.* Chapman, 1871–72, 36 Tex. 1; Weis *v.* Delvin, 1887, 67 Tex. 507; 3 S. W. 726; 60 Am. Rep. 38; Clark *v.* Franklin, 1836, 7 Leigh (Va.) 1; Hysell *v.* Sterling Coal Co., 1899, 46 W. Va. 158; 33 S. E. 95; Cook *v.* McCabe, 1881, 53 Wis. 250; 10 N. W. 507; 40 Am. Rep. 765; Halsey *v.* Waukesha Springs Sanitarium, 1905, 125 Wis. 311; 104 N. W. 94; 110 Am. St. Rep. 838. And see Schwartz *v.* Saunders, 1867, 46 Ill. 18; Rawson *v.* Clark, 1873, 70 Ill. 656; Clark *v.* Busse, 1876, 82 Ill. 515; Teakle *v.* Moore, 1902, 131 Mich. 427; 91 N. W. 636; Ellis *v.* Midland R. Co., 1881, 7 Ont. App. 464.

was whether the defendant was liable for the loss of lumber which the plaintiff had distributed along the bridge and the river banks but which at the time of the fire had not actually been used in making repairs. HAMMOND, J. (p. 520): "In whatever way the principle may be stated, it would seem that the liability of the owner is a case like this should be measured by the amount of the contract work done which, at the time of the destruction of the structure, had become so far identified with it as that but for the destruction it would have inured to him as contemplated by the contract. In the present case the defendant, in accordance with this doctrine, should be held liable for the labor and materials actually wrought into the bridge."

Hayes v. *Gross*, 1896, 9 App. Div. 12; 40 N. Y. Supp. 1098; affirmed without opinion, 1900, 162 N. Y. 610; 57 N. E. 1112: Action to recover for labor performed and materials furnished by plaintiff under a contract for carpenter work on a hotel building, which in the course of plaintiff's performance was destroyed by fire. LANDON, J. (p. 13): "When a builder agrees to erect and complete an entire house, if the house is destroyed by fire before completion, the builder can erect another; and, if he does not do so, he is guilty of a breach of his contract. But if a painter agrees to paint a certain house, and the house is destroyed before the painting is finished, it is impossible for him to complete his contract. If a new house should be erected, it would not be the house he had agreed to paint. Why should not the painter be paid for his part performance? It was no fault of his that full performance was impossible. But why should the owner pay? Because every stroke of the painter's brush converted something of the painter's labor and material into the property of the owner and thus the fire destroyed the owner's property, and not the painter's. If the painter had been painting a boat which he had agreed to make and deliver to the vendee, and fire had destroyed it before delivery, the whole loss would have been his, and not the vendee's, since title would not pass until delivery."

In the Massachusetts case of *Lord* v. *Wheeler*[1] the court, in allowing a recovery, said:

[1] 1854, 1 Gray (Mass.) 282, 283.

"The precise ground on which the plaintiff can recover in this case is, that, when the repairs upon the house were substantially done, and before the fire, the defendant by his tenant entered into and occupied it, and so used and enjoyed the labor and materials of the plaintiff; and that such use and enjoyment were a severance of the contract, and an occupation *pro tanto* by the defendant." [1]

This does not make it entirely clear whether the defendant is held liable in contract because of the severance, by occupation, of that part of the contract which was performed from that which was not, or in quasi contract because of the enjoyment, by use and occupation, of the improved property. As to contractual liability it would seem difficult to regard the mere occupation of one's own house while it is undergoing repairs as a severance of the contract to make the repairs. " It would seem that a defendant, so long as he does no act to interfere with the performance by a plaintiff of his contract, and is not under a contract to surrender exclusive possession of his property while repairs are being made, should be allowed, if he is willing to undergo the inconvenience consequent upon living in a house which is being repaired, to live therein without being held to waive the conditions of the contract." [2] On the other hand, if the court, by declaring the defendant liable upon the " precise ground " that by entering into the occupation of the building he reaped a benefit from the plaintiff's performance, intended to indicate that without proof of such occupation there could have been no recovery, its view was contrary to the settled doctrine of Massachusetts.[3]

§ 117. **Same: Upon principle.** — The cases denying a recovery have the support of Professor Keener. Referring to one

[1] *Cf.* Louisville Foundry, etc., Co. *v.* Patterson, 1906, 29 Ky. Law Rep. 349; 93 S. W. 22, 23.

[2] Keener, "Quasi-Contracts," p. 256. And see Munro *v.* Butt, 1858, 8 El. & Bl. 738, 753; Forman & Co., Proprietary *v.* The Ship "Liddesdale," [1900] A. C. 190, 204; Hanley *v.* Walker, 1890, 79 Mich. 607, 619; 45 N. W. 57; 8. L. R. A. 207.

[3] See cases cited in note 1, page 180.

of the decisions in which relief was granted, *Cleary* v. *Sohier*,[1] he says:[2] "As the plaintiff had not completed his contract, and as the defendant was deriving no benefit from the work done by the plaintiff, the house being in the course of erection, it seems impossible to support the decision except on the theory of the New York decisions, — namely, that in such a case the defendant in fact agrees to keep the building in existence." And again:[3] "The ground therefore upon which the court decided in favor of the plaintiff in *Lord* v. *Wheeler* cannot be used to support the decision of the court in *Cleary* v. *Sohier*, since the defendant had not enjoyed the work done by the plaintiff by using and occupying the premises."

It is respectfully submitted that the doctrine of no recovery, approved by Professor Keener, is unsound. It appears to rest solely upon the hypothesis that the only profit derivable from a building is that which results from use and occupation. If such were the fact, it would follow that evidence of the *complete* performance of a contract for the repair or improvement of a building, without evidence of use and occupation thereof, would be insufficient to support a quasi contractual action. Yet in the cases of improvements made under contracts unenforceable because of the Statute of Frauds, or upon the property of another by mistake, neither use and occupation by the defendant nor completion of the contemplated improvement by the plaintiff appears to be regarded as essential. As a matter of fact it cannot be questioned that an incomplete and unoccupied improvement may be a benefit to the owner of the property. When such incomplete improvement actually enhances the market value of the property the benefit is obvious. But when the improvement is entered upon at the instance of the owner of the property, such enhancement of value is not essential to the derivation of a benefit, for even completion of the improvement might not result in an enhancement of value. In such a case, every unit or particle of material which, in accordance with the

[1] 1876, 120 Mass. 210.
[2] Keener, "Quasi-Contracts," p. 254.
[3] Keener, "Quasi-Contracts," p. 255.

defendant's wish, is irrevocably appropriated to the improvement of the defendant's property, and every stroke of labor performed upon such material or upon the property improved, constitutes a benefit to the defendant, and the failure of the defendant to *use* or *occupy* such improvement — to enter into the "enjoyment" of it,—clearly cannot affect the right of recovery.

It is not improbable that in the cases denying a recovery the courts were influenced by the fact that the very event which in these cases makes performance impossible — the destruction of the building — also puts an end to the defendant's enjoyment of or profit from the plaintiff's part performance. This gives a recovery for such part performance the appearance of hardship. But it must be remembered that the plaintiff is equally innocent with the defendant and that a hardship to one or the other is inevitable. Moreover, the defendant may and usually does insure his building, and is thereby indemnified, while the plaintiff cannot insure labor, nor materials which have become the defendant's property.

§ 118. **Same: Doctrine of Niblo v. Binsse.** — In the New York case of *Niblo* v. *Binsse*,[1] which has had some following elsewhere, a recovery for services rendered and materials used in setting up a steam engine and heating apparatus was allowed upon the peculiar ground that the owner of the building, for whom the work was being done, impliedly undertook to keep the building in existence until the work was completed. Said the court:

"No principle of law is better settled than this, that when one party has, by his own act or default, prevented the other party from fully performing his contract, the party thus preventing performance cannot take advantage of his own act or default, and screen himself from payment for what has been done under the contract. The law will imply a promise on his part to remunerate the other party for what has been done and support an action upon such implied promise.

[1] 1864, 3 Abb. App. Dec. (N. Y.) 375, 378.

"This case falls exactly within this principle of law. . . . If one party agrees with another to do work upon a house, or other building, the law implies that the employer is to have the building in existence upon which the work contracted for may be done. It is necessarily a part of the contract on the part of such employer, whether it is specified in it in terms or not. Here the defendant's testator failed to provide and keep the building till the work could be completed, and thus, — and thus only, — was performance prevented." [1]

If it be conceded that the owner of a building impliedly undertakes to keep it in existence during the performance of a contract for work upon it, the plaintiff in such cases as *Niblo* v. *Binsse* clearly has a right of action for *breach of contract.* His recovery on the common counts properly rests, therefore, not upon the

[1] *Accord:* Rawson *v.* Clark, 1873, 70 Ill. 656, 658, (Action to recover value of labor and materials furnished under a contract to manufacture and place in a building certain ironwork. After all the ironwork had been manufactured but before any of it had been set up, the building was wholly destroyed by fire. SHELDON, J.: "The reason of their not entirely completing their contract by placing the ironwork in the building, was, the default of the defendant in not having a building provided for the purpose."); Haynes, Spencer & Co. *v.* Second Baptist Church, 1882, 12 Mo. App. 536, 545; *aff.* 1885, 88 Mo. 285; 57 Am. Rep. 413, (Action to recover value of certain pews and other woodwork and labor and materials furnished under a contract by which the plaintiff agreed to "make, finish and put up complete, furnishing all labor and materials, the pews in the audience room and in the gallery, the pulpit and the screen over the pulpit and baptistry, and the organ front" for $4800 to be paid on completion and acceptance of the work. During the plaintiff's performance the building caught fire from some unexplained accident and was destroyed. BAKEWELL J.: "Where the owner of the property retains possession and contracts for work to be done upon it while in his custody, there is, we think, an implied obligation resting upon him to have it in readiness for the work to be performed upon it, and the plaintiff was not bound to provide in the contract for the default of the other party in the matter of this obligation. So far as regards an impossibility arising from the act of God, neither party need provide against that in his contract; but from an impossibility arising from human agency, and an accidental fire making it impossible to finish the building in time to receive the woodwork, it would seem that the owner and occupier of the building, rather than one having access to it as one of many contractors employed in its repair or construction, should provide.") See also Rhodes *v.* Hinds, 1903, 79 App. Div. 379; 79 N. Y. Supp. 437, 439.

right to recover in quasi contract where a contract is unenforceable because of impossibility of performance, but upon the right to elect between the alternative remedies of compensation and restitution in the case of breach by the defendant (*post*, § 260 *et seq.*).

In the more recent New York case of *Hays* v. *Gross*,[1] the Appellate Division of the Supreme Court ventured to reject the reasoning of *Niblo* v. *Binsse*. Said LANDON, J.:

"We think Niblo *v.* Binsse, upon which the learned referee relied, was correctly decided, but, with due respect, we submit that the decision was placed upon untenable ground. The court said that it placed its decision upon the ground that the contractor was prevented from performing his contract by the default of the owner in failing to keep on hand and in readiness the building in which the work was to be done, and was in default whether the building was destroyed with or without fault on his part. The case shows that the building was destroyed without fault of either owner or contractor. If the defendant was without fault in the destruction of the building, it is difficult to see how he was in default for not keeping it on hand. In the Niblo Case, as in the one under review, we think the destruction of the building prevented and excused the defendant from keeping it on hand, and that neither party could recover damages of the other upon account of the breach of the contract thereby caused. Authorities in other states, while denying the right of either party to the contract to recover of the other damages of [for] a breach of the contract when performance is defeated by the destruction of the building . . . affirm the right of the contractor to recover for what he has done and furnished up to the time of its destruction."

§ 119. (*b*) **Destruction of personalty in course of alteration or repair.** — The case of the destruction of goods or chattels in the course of alteration or repair, without the fault of the bailee, is on all fours with that of the destruction of a building during the making of improvements thereon. The labor and materials be-

[1] 1896, 9 App. Div. 12, 16; 40 N. Y. Supp. 1098, *aff.* 1900, 162 N. Y. 610; 57 N. E. 1112.

ing expended in response to the desire of the owner of the property and being incorporated in or absorbed by the property, constitute a benefit to such owner, whether or not they enhance the value of the goods. And neither the fact that the full benefit contemplated by the contract is not conferred, nor the fact that the owner is deprived of the "enjoyment," by use or sale, of the benefit, should be permitted to defeat a recovery.

This view appears to have been taken by Lord MANSFIELD:

Menetone v. *Athawes*, 1764, 3 Burr. 1592: Action by a shipwright for work and materials in repairing defendant's ship. The ship was in a dock hired by the defendant from the plaintiff, and was destroyed by fire when only three hours' work was wanting to complete the repairs.

Mr. Dunning, for the defendant: "The question is, 'Whether the plaintiff is entitled to be paid by the defendant for *that* work and labor from which the defendant neither did nor could reap any *advantage*' . . ."

Mr. Murphy, in reply: "Suppose a horse sent to a farrier's to be cured, is burnt in the stable before the cure is completely effected: shall not the farrier be paid for what he has *already* done?"

Lord MANSFIELD (p. 1594): "This is a desperate case for the defendant (though compassionate): I doubt it is very difficult for him to maintain his point. Besides it is stated, 'that he paid 5*l.* for the use of the dock.'"

Mr. Justice WILMOT: "So that it is like a horse that a farrier was curing being burnt in the owner's own stable."

As heretofore stated, however (*ante*, § 112), it subsequently became the settled doctrine in England that a party in default, even though complete performance is impossible, cannot recover the benefit resulting from part performance. And *Menetone* v. *Athawes* was distinguished as a case in which the agreement was not to pay for the entire repairs when completed, but for such work as the shipwright might do and in which, therefore, the plaintiff's recovery was upon the contract itself:

Appleby v. *Myers*, 1867, L. R. 2 C. P. 651: Action for work and materials in erecting engine, boiler, and certain machinery

in the defendant's property. In the course of the plaintiff's performance of his contract, the defendant's premises were destroyed by fire. BLACKBURN, J. (p. 659): "It is quite true that materials worked by one into the property of another become part of that property. This is equally true, whether it be fixed or movable property. Bricks built into a wall become part of the house; thread stitched into a coat which is under repair, or planks and nails and pitch worked into a ship under repair, become part of the coat or the ship; and therefore, generally, and in the absence of something to shew a contrary intention, the bricklayer, or tailor, or shipwright, is to be paid for the work and materials he has done and provided, although the whole work is not complete. It is not material whether in such a case the non-completion is because the shipwright did not choose to go on with the work, as was the case in *Roberts* v. *Havelock*,[1] or because in consequence of a fire he could not go on with it, as in *Menetone* v. *Athawes*. But, though this is the primâ facie contract between those who enter into contracts for doing work and supplying materials, there is nothing to render it either illegal or absurd in the workman to agree to complete the whole, and be paid when the whole is complete, and not till then: and we think that the plaintiffs in the present case had entered into such a contract."

In America, the value of the labor and materials expended upon the property may be recovered.[2]

§ 120. (*c*) **Loss of goods in course of carriage: Disablement of carrying vessel.** — There appears to be little difference, in principle, between the case of the destruction of goods, without fault, while undergoing repair, discussed in the preceding section, and that of the loss of goods, without fault, during carriage. It appears to be the law, however, that the carrier can recover nothing for the carriage of goods which are lost in course of transportation and therefore cannot be delivered at their destination:

[1] 1832, 3 Barn. & Ad. 404.

[2] Whelan *v.* Ansonia Clock Co., 1884, 97 N. Y. 293; Labowitz *v.* Frankfort, 1893, 4 Misc. Rep. 275; 23 N. Y. Supp. 1038; Rhodes *v.* Hinds, 1903, 79 App. Div. 379; 79 N. Y. Supp. 437. See Parsons, "Contracts" (9th ed.), Vol. II, 131.

British, etc., Ins. Co. v. *Southern Pacific Co.*, 1896, 72 Fed. 285; 18 C. C. A. 561; 38 U. S. App. 243: Libel to recover certain sums withheld as *pro rata* freight on certain cotton which was in part damaged and in part destroyed while in possession of the carrier. LACOMBE, Circuit Judge (p. 287): "From the decree of the district court the respondent also appeals, insisting that the carrier should be allowed to reserve from the proceeds of the damaged cotton pro rata freight for the bales which were totally destroyed, and which, of course, were never accepted by the owner at the intermediate port, and, being no longer in existence, could not be reconditioned and forwarded as damaged bales. No authority is cited in support of this contention. Presumably none could be found, for it is elementary that, except in those cases where by express contract the freight is stipulated to be paid in advance, delivery at the port of discharge is a condition precedent to the shipowner's right to have the freight." [1]

In the case of the disablement of the carrying vessel and a resulting delivery or tender of the goods to the owner at some port of distress, the benefit accruing to the owner from the carrier's part performance may be more obvious. But it is settled that nothing can be recovered by the carrier unless the owner voluntarily waives further carriage and consents to accept the goods at the port of distress, in which case a genuine contract to pay *pro rata* freight is implied.[2] The leading case permitting a recovery *pro rata* where the goods are delivered at a port of distress is *Luke* v. *Lyde*.[3] Lord Chief Justice COCKBURN,

[1] *Accord:* Gibson *v.* Sturge, 1885, 10 Exch. 622; Dakin *v.* Oxley, 1864, 15 C. B. N. S. 646. See also Mackrell *v.* Simond, 1776, Abbott on "Shipping" (5th ed.), 333; (14th ed.), p. 743; Scott's "Cases on Quasi-Contracts," p. 621; Hutchinson, "Carriers" (3d ed.), § 800 and cases cited.

[2] Luke *v.* Lyde, 1759, 2 Burr. 882; 1 W. Bl. 190; Liddard *v.* Lopes, 1809, 10 East 526; Hopper *v.* Burness, 1876, 1 C. P. D. 137; Metcalfe *v.* Brittania Ironworks Co., 1876, 1 Q. B. D. 613; Caze *v.* Baltimore Ins. Co., 1813, 7 Cranch (U. S.) 358; Hurtin *v.* Union Ins. Co., 1806, 1 Wash. (U. S. C. C.) 530; Fed. Cas., No. 6942; Welch *v.* Hicks, 1826, 6 Cow. (N. Y.) 504; Callender *v.* Ins. Co. of N. A., 1813, 5 Binney (Pa.) 525; Richardson *v.* Young, 1861, 38 Pa. St. 169. For additional citations, see Hutchinson, "Carriers" (3d ed.), § 815.

[3] 1759, 2 Burr. 882; 1 W. Bl. 190.

in his dissenting opinion in *Metcalfe* v. *The Brittania Ironworks Company*,[1] insisted that Lord MANSFIELD based his decision in *Luke* v. *Lyde* " not upon any fiction of a substituted contract, . . . but upon the broad principle of maritime law, that, the voyage having been interrupted without any fault of the shipowner, the merchant, who has had the benefit of partial conveyance, if he takes the goods, must pay freight pro ratâ," and therefore that the consent of the owner of the goods to delivery at the port of distress was immaterial. But the contrary interpretation of Lord MANSFIELD'S decision has prevailed.[2]

§ 121. (*d*) **Loss of vessel in course of seaman's service.** — Under the maxim of the maritime law that " Freight is the mother of wages, the safety of the ship the mother of freight," it was held that in case of the loss of the vessel during a voyage no wages were recoverable.[3] Where the ship was lost on the homeward voyage, however, wages were allowed for service up to the arrival of the vessel at her last port of delivery or destina-

[1] 1876, 1 Q. B. D. 613, 620.

[2] See Dakin *v.* Oxley, 1864, 15 C. B. N. S. 646, 665, (WILLES, J.: "As to freight pro ratâ itineris, in respect of goods accepted, and their future carriage waived, at an intermediate port, it becomes due, not under the charter party, but by a new contract inferred from the conduct of the parties, . . . It was in such a case that Lord Mansfield in Luke *v.* Lyde, 2 Burr. 882, 1 W. Bl. 190, said that the merchant, 'if he abandons, is excused freight, and he may abandon all though they are not all lost.' This is correct, if, instead of 'abandon' be read 'decline to accept,' because it is clear, that, where the goods have not been carried all the way, the merchant need not, in order to prevent a liability for frieght pro ratâ, give up the property to the shipowner; and abandonment, in maritime law, involves a giving up of the property."); Callender *v.* Ins. Co. of N. A., 1813, 5 Binney (Pa.) 525, 533, (TILGHMAN, C.J., after discussing Lord MANSFIELD'S celebrated case of Luke *v.* Lyde: ". . . it seems to have been understood, that *pro rata* freight is not due, unless the consent of the merchant, either by words or actions, has been expressly given, or may be fairly deduced, to accept his goods at an intermediate port; and such consent being given, the original contract is dissolved, and a new one arises.").

[3] Hernaman *v.* Bawden, 1766, 3 Burr. 1844; Lady Durham, 1835, 3 Hagg. Adm. 196; Pitman *v.* Hooper, 1837, 3 Sumn. (U. S. C. C.) 50; Fed. Cas., No. 11,185; Savary *v.* Clements, 1857, 8 Gray (Mass.) 155; Van Beuren *v.* Wilson, 1828, 9 Cow. (N. Y.) 158; 18 Am. Dec. 491. For additional authorities, see 25 Am. & Eng. Ency. of Law (2d ed.), 100, 101.

tion before the loss, and for one half the time she remained at that port.[1]

In *Appleby* v. *Dods*,[2] because of an express condition "that no seaman shall demand or be entitled to his wages, or any part thereof, until the arrival of the ship at the above mentioned port of discharge," Lord ELLENBOROUGH refused to permit a recovery of wages for the outward voyage, although it was conceded that freight had been earned for such outward voyage and assumed that the sole purpose of the condition quoted was to prevent desertion at intermediate ports. As pointed out in a previous section (§ 114), if it had been *proved* that the sole purpose of the condition was to protect the defendant against desertion, the plaintiff would have been entitled, upon principle, to recover the value of his part performance.[3]

By statute, both in England[4] and in the United States,[5] seamen are now entitled to wages earned up to the time of the vessel's loss — a rule which accords with quasi contractual principles.

§ 122. (*e*) **Illness or death of contractor.** — Since the illness or death of a contractor does not, like fire or shipwreck, deprive

[1] Johnson *v.* Sims, 1800 (?), 1 Pet. Adm. (U. S., D. Pa.) 215; Fed. Cas., No. 7413; Cranmer *v.* Gernon, 1807, 2 Pet. Adm. (U. S., D. Pa.) 390; Fed. Cas., No. 3359; Pitman *v.* Hooper, 1838, 3 Sumn. (U. S. C. C.) 286; Fed. Cas., No. 11,186. And see Mackrell *v.* Simond, 1776, Abbott on "Shipping" (5th ed.), 333; (14th ed.), 743; Scott, "Cases on Quasi-Contracts," p. 621.

[2] 1807, 8 East 300.

[3] In Johnson *v.* Sims, 1800, 1 Pet. Adm. (U. S., D. Pa.) 215, 216; Fed. Cas., No. 7413, a stipulation couched in precisely the same words as that in Appleby *v.* Dods was construed to mean, not that the sailor was not entitled to wages for the outward voyage, but merely that he was not entitled to *demand* such wages until the vessel arrived at the home port. Said the court: "I will never decree a forfeiture, or loss of wages, unless the law or agreement of parties is fully and clearly, both in expression and import, against the claim. It does not appear in this case that more than the usual wages were agreed to be paid to the mariner, though the clause in question is out of the common course."

[4] 7 & 8 Vict., c. 112, § 17; 57 & 58 Vict., c. 60, § 158 (Merchant Shipping Act, 1894).

[5] Rev. Stat. U. S. §§ 4525, 4526; The Charles D. Lane, 1901, 106 Fed. Rep. 746.

the defendant of the fruits of part performance, the benefit resulting from such part performance is more obvious and the element of hardship to the defendant entirely wanting. As a result, it is generally held, in the United States, that the value of part performance may in such cases be recovered.[1]

In England, consistently with other classes of cases, a recovery is denied,[2] though *Cutter* v. *Powell*,[3] which is generally regarded as a leading case for the English doctrine, is distinguishable, as is elsewhere shown (*ante*, § 113), in that the terms of the contract plainly indicated the intention of the contractor to assume the risk of illness or death. An exception to the rule is recognized, moreover, in the case of domestic servants, who are by custom paid for the actual services rendered by them.[4]

[1] *Performance prevented by death:* Wolfe *v.* Howes, 1859, 20 N. Y. 197, 75 Am. Dec. 388; Clark *v.* Gilbert, 1863, 26 N. Y. 279; 84 Am. Dec. 189; McClellan *v.* Harris, 1895, 7 S. D. 447; 64 N. W. 522; Lauda *v.* Shook, 1895, 87 Tex. 608; 30 S. W. 536, (death of one member of a law firm).

Performance prevented by illness: Ryan *v.* Dayton, 1856, 25 Conn. 188; 65 Am. Dec. 560; Coe *v.* Smith, 1853, 4 Ind. 79; 58 Am. Dec. 618; Stolle *v.* Stuart, 1908, 21 S. D. 643; 114 N. W. 1007; Fenton *v.* Clark, 1839, 11 Vt. 557; Patrick *v.* Putnam, 1855, 27 Vt. 759; Hubbard *v.* Belden, 1855, 27 Vt. 645. In Ryan *v.* Dayton, *supra*, the court said (p. 194): "Viewing the present as a contract for the personal services of the plaintiff, and which could only be performed by himself, we think that, from its nature, a condition was impliedly attached to it, that an inability to labor during a part of the time stipulated, produced by inevitable necessity, should so far constitute an excuse for not laboring during that period, that he should not thereby be deprived of a right to a reasonable compensation for the services performed by him under it: and that the rule that where a person by his own contract, creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, which properly understood, we do not intend to impugn, is not applicable to such a contract." But see Jennings *v.* Lyons, 1876, 39 Wis. 553; 20 Am. Rep. 57, allowing no recovery because illness of wife should have been foreseen.

In Alabama, a recovery was formerly denied: Green *v.* Linton, 1838, 7 Port. (Ala.) 133; 31 Am. Dec. 707; but the rule, in its application to contracts of personal service, was changed by statute. See Code of 1876, § 2922; Dryer *v.* Lewis, 1877, 57 Ala. 551.

[2] See Plymouth *v.* Throgmorton, 1688, 1 Salk. 65; Cutter *v.* Powell, 1795, 6 Term R. 320; Bayley *v.* Rimmell, 1836, 1 Mees. & Wels. 506.

[3] 1795, 6 Term R. 320.

[4] See Eversley, "Domestic Relations" (3d ed.), p. 872.

It has been held, in a case where the plaintiff engaged that he and his wife should live in the defendant's house and maintain her for life, that the death of the plaintiff's wife made the contract impossible of performance and that the plaintiff might recover the value of the maintenance furnished during the wife's life.[1]

An interesting extension of the principle is found in the cases in which unanticipated circumstances creating grave danger of serious physical injury or disease are held to have the same effect as actual illness — excusing default and entitling the contractor to the value of the services rendered in partial performance.[2]

[1] Parker *v.* Macomber, 1892, 17 R. I. 674, 676; 24 Atl. 464; 16 L. R. A. 858, (DOUGLAS, J., after holding that death of plaintiff's wife justified defendant in rescinding the contract: "The question is then presented whether a person who has rendered personal services under an entire contract, which the Act of God has prevented him from fully performing, can recover upon an implied *assumpsit* what those services are really worth. In case of the destruction of the fruits of the service so that neither party has the value of them, the loss must be adjusted according to the scope of the contract and the circumstances of the case, and different courts may come to diverse conclusions in cases which are very similar to each other. But when, as in this case, the defendant has received and retains the benefit of the service, we think that the plaintiff should recover. It is not just that one should benefit by the labor of another and make no return, when the event which ends the service happens without the fault of either party, and is not expressly or impliedly insured against in the agreement which induced the labor."). See also Jennings *v.* Lyon, 1876, 39 Wis. 553; 20 Am. Rep. 57.

[2] Lakeman *v.* Pollard, 1857, 43 Me. 463; 69 Am. Dec. 77, (prevalence of cholera in vicinity); Walsh *v.* Fisher, 1899, 102 Wis. 172; 78 N. W. 437; 43 L. R. A. 810; 72 Am. St. Rep. 865, (threats of strikers to do bodily harm). *Cf.* School Township of Carthage *v.* Gray, 1894, 10 Ind. App. 428; 37 N. E. 1059, and Dewey *v.* Union School District, 1880, 43 Mich. 480; 5 N. W. 646; 38 Am. Rep. 206, which hold that the closing of a school by a school committee on account of the prevalence of a contagious disease does not excuse the town or district from the obligation to pay teachers' wages. It would seem that the court was influenced in these cases by the notion that the public should pay for its own protection. Says GRAVES, J., in Dewey *v.* Union School District (p. 483): "It was the misfortune of the district, and the district and not the plaintiff ought to pay for it." Stewart *v.* Loring, 1862, 5 Allen (Mass.) 306; 81 Am. Dec. 747, *contra.*

§ 123. **Same: Limitation of rule.** — In the case of the illness or death of one who has undertaken personally to manufacture or produce something for another, in the course of such manufacture or production and before the passing of title, the part performance, if it may be so called, is obviously of no benefit to the other party and cannot properly form the basis of a quasi contractual recovery. This was pointed out by JOHNSON, C.J., in *Wolfe* v. *Howes*,[1] where he is reported to have observed that:

"It was material that the defendants had received actual benefit from the services of the plaintiff's testator, and that quite a different question would be presented by a case where the services actually rendered should prove valueless; as, *e.g.* if one should be retained to compose any original literary work, and having faithfully employed himself in preparation, should die without having completed any work of value to the employer."

§ 124. (*f*) **Act of government.** — Cases in which the performance contemplated by a contract is forbidden at the time the contract is entered into are treated in the chapter on contracts unenforceable because of illegality.[2] Instances are not rare, however, in which a legal contract subsequently becomes impossible of performance without violation of law because of some governmental act, either executive, legislative, or judicial. And the right to recover the benefit conferred by a partial performance of a contract, under such circumstances, has been recognized:

Jones v. *Judd*, 1850, 4 N. Y. 411: Action for work and labor. The defendant, under contract with the state to complete certain sections of a canal, entered into a subcontract with the plaintiffs for a part of the work, by which he agreed to pay them seven cents per yard for excavating and eight cents for embankment, monthly, according to measurements of engineers, except ten per cent which was not to be paid until

[1] 1859, 20 N. Y. 197, 203; 75 Am. Dec. 388.
[2] *Post*, § 132 *et seq.*

final estimate. The defendant paid the plaintiffs for all work performed, except the ten per cent reserved. GARDINER, J. (p. 413): "The plaintiffs were stopped in the prosecution of the work, in fulfillment of their contract, by the authority of the state officers. Before this injunction was removed, the law of March 29, 1842, for preserving the credit of the state, was passed, which put an end to the original contract, and the agreement between the plaintiffs and defendant which grew out of it. As the plaintiffs were prevented, by the authority of the state, from completing their contract, they are entitled to recover for the work performed, at the contract price. The ten per cent was a part of the price stipulated. It was reserved to secure the fulfillment of the contract, and to be paid upon a *final estimate.* The performance of the required condition became impossible by the act of the law, and of course the plaintiffs were entitled to recover without showing a compliance with the agreement in this particular." [1]

New York Life Ins. Co. v. *Statham; Same* v. *Seyms; Manhattan Life Ins. Co.* v. *Buck,* 1876, 93 U. S. 24: The first case a bill in equity, the other two actions at law, to recover the amounts of life insurance policies. The premiums were paid until the outbreak of the Civil War which made payments impossible, and the persons insured died during the war. BRADLEY, J. (p. 34): "Whilst the insurance company has a right to insist on the materiality of time in the condition of payment of premiums, and to hold the contract ended by reason of non-payment, they cannot with any fairness insist upon the condition, as it regards the forfeiture of the premiums already paid; that would be clearly unjust and inequitable. The insured has an equitable right to have this amount restored to him, subject to a deduction for the value of the assurance enjoyed by him whilst the policy was in existence; in other words, he is fairly entitled to have the equitable value of his policy." [2]

[1] Also: Whitfield *v.* Zellnor, 1852, 24 Miss. 663; Theobald *v.* Burleigh, 1891, 66 N. H. 574; 23 Atl. 367; Heine *v.* Meyer, 1874, 61 N. Y. 171; L. Craddock & Co. *v.* Wells-Fargo Co., Express, 1910, Tex. Civ. App. ; 125 S. W. 59, (*cf.* Binz *v.* National Supply Co., 1907, Tex. Civ. App. ; 105 S. W. 543).

[2] For an excellent discussion of the different views as to the effect of war upon a policy of insurance, and the rights of the insured at the conclusion of the war, see Abell *v.* Penn Mutual Life Ins. Co., 1881,

In *Manhattan Life Insurance Company* v. *Buck*, one of the three cases just stated together, the decision of the court is questionable. The policy contained a clause not found in the policies involved in the other two cases, that "in every case where the policy should cease or become null and void, all previous payments made thereon should be forfeited to the company." This provision indicates that the insured assumed the risk of losing everything if for *any* cause the policy were to be extinguished. The case is therefore similar to *Cutter* v. *Powell*,[1] where the estate of a ship's officer who died during the voyage was denied compensation for the services rendered before his death on the ground that it was the understanding that the officer was to receive no compensation unless he completed the entire voyage, and that in consideration of the risk assumed by him his compensation in the event of his completing the voyage was to be larger than it would have been but for this understanding. As Professor Keener has pointed out,[2] if *Manhattan Life Insurance Company* v. *Buck* is to be supported, it must be upon the theory that a court of law will relieve against a forfeiture, a doctrine which has usually been regarded as peculiar to equity.

§ 125. (3) **Measure of recovery.** — Ordinarily the plaintiff should be allowed to recover the reasonable worth of his part performance, less any payment or other benefit received from the defendant.[3] In the case of improvements upon land, for instance, since they are made at the request of the defendant, he should be required to pay the value of the labor and materials employed whether the land is enhanced in value or not.[4] More-

18 W. Va. 400, 423. In that case the court criticized the measure of recovery adopted in New York Life Ins. Co. *v.* Statham. See *post*, § 126.

[1] 1795, 6 Term R. 320.

[2] "Quasi-Contracts," p. 247.

[3] Coe *v.* Smith, 1853, 4 Ind. 79; 58 Am. Dec. 618.

[4] Dame *v.* Wood, 1908, 75 N. H. 38; 70 Atl. 1081, 1082. And see Clark *v.* Gilbert, 1863, 26 N. Y. 279; 84 Am. Dec. 189, (services). But see Binz *v.* National Supply Co., 1907, Tex. Civ. App. ; 105 S. W. 543; Hubbard *v.* Belden, 1855, 27 Vt. 645, (services: actual benefit to employer only).

over, though there are authorities to the contrary,[1] it seems clear that since the plaintiff is not guilty of breach of contract there should be no deduction for damages suffered by the defendant by reason of the plaintiff's inability to complete performance. But the recovery should in no case be permitted to exceed an amount bearing the same ratio to the contract price for full performance as the value of the part performance bears to the value of full performance.[2] Otherwise the plaintiff might actually profit by the impossibility of completing performance, and the defendant, who is not in default and who is not responsible for the plaintiff's failure to complete performance, might be compelled to pay for the plaintiff's part performance not only at a higher rate of compensation than he actually agreed to pay but at a higher rate then he would have been willing to pay.

In the New York case of *Jones* v. *Judd*,[3] arising out of a contract expressly fixing a rate of compensation instead of an aggregate price, the plaintiff was allowed to recover at the contract rate for his part performance. And in the Indiana case of *Coe* v. *Smith*,[4] the court said that " the amount recovered must, in no case, exceed the contract price, or the rate of it for the part of the contract performed." As a means of *measuring* the recovery, the contract rate is of course unsatisfactory, since it does not always accurately express the value of the performance. As a means of *limiting* the recovery, it is satisfactory in case it parallels perfectly the value of the services — that is to say, either if the units of service contemplated by the contract are of uniform value, or if the rate fixed by the contract varies with the variation in value. Otherwise, it is not. Suppose, for example, as was actually the case in *Jones* v. *Judd*, one contracts

[1] Clark *v.* Gilbert, 1863, 26 N. Y. 279; 84 Am. Dec. 189; Patrick *v.* Putnam, 1855, 27 Vt. 759; Walsh *v.* Fisher, 1899, 102 Wis. 172; 78 N. W. 437; 43 L. R. A. 810; 72 Am. St. Rep. 865. And see Coe *v.* Smith, 1853, 4 Ind. 79; 58 Am. Dec. 618; Wolfe *v.* Howes, 1859, 20 N. Y. 197; 75 Am. Dec. 388.

[2] Dame *v.* Wood, 1908, 75 N. H. 38; 70 Atl. 1081, 1082; Clark *v.* Gilbert, 1863, 26 N. Y. 279; 84 Am. Dec. 189.

[3] 1850, 4 N. Y. 411.

[4] 1853, 4 Ind. 79, 82; 58 Am. Dec. 618.

to do a large amount of construction work, some parts of which are expected to be more difficult and expensive than others, at a uniform price per cubic yard. If, before performance is interrupted by impossibility, the more difficult and expensive work is done, the benefit derived from such part performance is greater than the amount due under the contract; on the other hand, if only the less difficult and expensive part of the work is done, the resulting benefit is less than the sum due under the contract. The true limit of recovery, in either case, is such a proportion of the contract price as the value of the part performed bears to the value of complete performance.

§ 126. **Same: In case of insurance contracts.** — In *New York Life Insurance Company* v. *Statham*,[1] the United States Supreme Court held that where the outbreak of war prevents further payments of premiums on an insurance policy, the insured is entitled to recover the premiums paid by him "subject to a deduction for the value of the assurance enjoyed by him whilst the policy was in existence." This was criticized in the West Virginia case of *Abell* v. *Penn Mutual Life Insurance Company*,[2] as permitting the insurance company to retain not only a sum sufficient to compensate it for the risk it had run but a large additional sum for profits. What should be deducted, it was there contended, is not the "value of the assurance" but the *cost* of the assurance, *i.e.* the cost to the company of carrying the risk. But clearly the company is enriched unjustly only to the extent that the benefit it has received — the premiums — exceeds in *value* the benefit it has conferred — the insurance. The amount to be deducted therefore is the *value* of the insurance to the insured, as was held in *New York Life Insurance Company* v. *Statham*.

§ 127. (II) **Defendant's performance prevented: In general.** — Since, in the cases under consideration in this chapter, the defendant is protected against the contingency resulting in his failure to perform by an implied condition, he cannot be held responsible for the damages sustained by the plaintiff as a re-

[1] 1876, 93 U. S. 24, 34.
[2] 1881, 18 W. Va. 400, 423 *et seq.*

sult of such failure. In other words, the defendant's failure to complete performance is not an actionable breach. But if the plaintiff, in reliance upon the contract and in expectation of the defendant's performance, has by his own performance conferred a benefit upon the defendant, he is entitled to restitution.[1]

§ 128. (1) **Recovery of prepaid purchase price of goods or land.** — Perhaps the most frequent application of the rule is to cases of the destruction of or injury to property while the subject of an executory contract of sale. In the case of personal property it is the general rule that payments made by the buyer are recoverable.[2] Where goods are delivered to the buyer, however,

[1] Knowles *v.* Bovill, 1870, 22 L. T. R. 70, (Action to recover £ 150 paid for the use of a patent which the patentee was about to renew and for the use of a new patent which the patentee was about to take out. The patentee died almost immediately after receiving payment and without making the applications. Held: that the plaintiff recover.); Hudson *v.* Hudson, 1891, 87 Ga. 678; 13 S. E. 583; 27 Am. St. Rep. 270, (Action by son to recover value of services in caring for father under contract by which father agreed to will to his son the home place. Father became insane and could not make will. Held: that the plaintiff recover.); Butterfield *v.* Byron, 1891, 153 Mass. 517; 27 N. E. 667; 12 L. R. A. 571; 25 Am. St. Rep. 654, (Action for breach of contract for the erection of a building by defendant for plaintiff. Certain amounts were paid to defendant, and when the building was nearly completed it was destroyed by fire. Held: that the plaintiff was entitled to the money paid, subject to a set-off for work and materials furnished by defendant.). See also Bibb *v.* Hunter, 1866, 2 Duv. (63 Ky.) 494, where it was held that money paid by one who had been drafted to serve in the United States army to one who had agreed to become his substitute but who had been rejected by a revisory board was recoverable. But see Tweedie Trading Co. *v.* James P. McDonald Co., 1902, 114 Fed. 984 (D. C. N. Y.), where recovery was denied of a sum paid under a contract for the transportation of laborers from the Barbadoes to Panama although, because of a regulation of the government forbidding the exportation of laborers, it became impossible to carry out the contract. And in Woodward *v.* Cowing, 1816, 13 Mass. 216, one who had paid money to an officer of a privateer for a share of the prizes she might make during a proposed cruise, which was prevented by the declaration of peace, was not allowed to recover.

[2] Logan *v.* Le Mesurier, 1847, 6 Moo. P. C. 116; Stone *v.* Waite, 1890, 88 Ala. 599; 7 So. 117; Meagher *v.* Carpenter, 1887, 8 Ky. Law Rep. (Ky. Super. Ct.) 702; Joyce *v.* Adams, 1853, 8 N. Y. 291; Williams *v.* Allen, 1849, 10 Humph. (29 Tenn.) 336; 51 Am. Dec. 709: Kelly *v.* Bliss, 1882, 54 Wis. 187; 11 N. W. 488.

and the title is retained by the seller merely as security for the price, the sale is in reality executed and the subsequent destruction of the goods should not be regarded as creating an impossibility of performance by the seller.[1] In the case of real property a majority of the courts which have passed upon the question have declared, apparently upon the assumption that the purchaser acquires by the contract the substantial rights of ownership, that the risk of loss rests upon the purchaser.[2] But in a number of important jurisdictions this view has been rejected and the risk of loss held to be with the vendor.[3] Where the

[1] Chicago Railway, etc., Co. *v.* Merchant's Bank, 1890, 136 U. S. 268, 283; 10 S. Ct. 999; Roach *v.* Whitfield & Hannah, 1910, 94 Ark. 448; 127 S. W. 722; Jessup *v.* Fairbanks, Morse & Co., 1906, 38 Ind. App. 673; 78 N. E. 1050; 140 Am. St. Rep. 131; Phenix Ins. Co. *v.* Hilliard, 1910, 59 Fla. 590; 52 So. 799; 138 Am. St. Rep. 171; Burnley *v.* Tufts, 1889, 66 Miss. 48; 5 So. 627; 14 Am. St. Rep. 540; Tufts *v.* Wynne & Thompson, 1891, 45 Mo. App. 42; American Soda Fountain Co. *v.* Vaughn, 1903, 69 N. J. L. 582; 55 Atl. 54; National Cash Register Co. *v.* South Bay, etc., Assn., 1909, 64 Misc. R. 125; 118 N. Y. Supp. 1044; Whitlock *v.* Auburn Lumber Co., 1907, 145 N. C. 120; 58 S. E. 909; 12 L. R. A. (N. S.) 1214; Harley & Willis *v.* Stanley, 1909, 25 Okl. 89; 105 Pac. 188; 138 Am. St. Rep. 900; Goldie & McCullough *v.* Harper, 1899, 31 Ont. R. 284; Marion Mfg. Co. *v* Buchanan, 1907, 118 Tenn. 238; 99 S. W. 984; 8 L. R. A. (N. S.) 590; Osborn *v.* South Shore Lumber Co., 1895, 91 Wis. 526; 65 N. W. 184; Lavalley *v.* Ravenna, 1905, 78 Vt. 152; 62 Atl. 47; 2 L. R. A. (N. S.) 97; 112 Am. St. Rep. 898. *Contra:* J. M. Arthur & Co. *v.* Blackman, 1894, 63 Fed. 536 (C. C., D. Wash.); Bishop *v.* Minderhout, 1900, 128 Ala. 162; 29 So. 11; 52 L. R. A. 395; 86 Am. St. Rep. 134; Randle *v.* Stone & Co., 1886, 77 Ga. 501, (and see Whigham *v.* W. Hall & Co., 1911, 8 Ga. App. 509; 70 S. E. 23); Swallow *v.* Emery, 1873, 111 Mass. 355. See Williston, "Sales," § 304.

[2] Paine *v.* Meller, 1801, 6 Ves. 349; Kuhn *v.* Freeman, 1875, 15 Kan. 423; Marks *v.* Tichenor, 1887, 85 Ky. 536; 4 S. W. 225; Brewer *v.* Herbert, 1868, 30 Md. 301; Snyder *v.* Murdock, 1872, 51 Mo. 175; Manning *v.* North British, etc., Ins. Co., 1907, 123 Mo. App. 456; 99 S. W. 1095; Sewell *v.* Underhill, 1908, 127 App. Div. 92; 111 N. Y. Supp. 85, (*cf.* Goldman *v.* Rosenberg, 1889, 116 N. Y. 78; 22 N. E. 259); Woodward *v.* McCollum, 1907, 16 N. D. 42; 111 N. W. 623; Dunn *v.* Yakish, 1900, 10 Okl. 388; 61 Pac. 926; Morgan *v.* Scott, 1856, 26 Pa. St. 51. And see Sutton *v.* Davis, 1906, 143 N. C. 474; 55 S. E. 844; Conklyn *v.* Shenandoah Milling Co., 1911, 68 W. Va. 257; 70 S. E. 274. See also article by Professor Williston, 9 Harv. Law Rev. 106, 112.

[3] Gould *v.* Murch, 1879, 70 Me. 288; 35 Am. Rep. 325; Wells *v.* Calnan, 1871, 107 Mass. 514; 9 Am. Rep. 65; Wilson *v.* Clark, 1880,

latter view prevails, payments advanced by the purchaser are recoverable.[1]

§ 129. (2) **Recovery of prepaid freight.** — The English courts have denied a quasi contractual recovery in one class of cases — that of freight prepaid, — basing their conclusion, apparently, upon the theory that the plaintiff assumed the risk of impossibility of performance by the defendant:

De Silvale v. *Kendall*, 1815, 4 Maul. & Sel. 37: Assumpsit to recover prepaid freight, the ship having been captured. Lord ELLENBOROUGH, C.J. (p. 43): "In the next place the word residue imports that it is freight that was to be partially advanced, of which the remainder only was to abide the usual risk which the law casts upon the earning of freight, that is, the conveyance of the cargo to its place of destination. The preceding payment was on the contrary, by the stipulation of the parties not to be subject to that risk, which but for the stipulation and by the ordinary course of law it would have been."

LE BLANC, J. (p. 44): "If it was intended that what was advanced at *Maranham* should be returned in the event that happened, the parties might have provided for it by their contract."[2]

Professor Keener explains *De Silvale* v. *Kendall* and like cases as follows:[3]

"The ground upon which these cases were decided seems to have been that as freight is not in the absence of express stip-

60 N. H. 352; Powell *v.* Dayton, etc., R. Co., 1885, 12 Or. 488. See article by Professor Williston, 9 Harv. Law Rev. 106, 113.

If, at the time of the calamity, the vendor is not in a position to convey the legal title, the loss falls on the vendor. Phinizy *v.* Guernsey, 1900, 111 Ga. 346; 36 S. E. 796; 50 L. R. A. 680; 78 Am. St. Rep. 207; Eppstein *v.* Kuhn, 1906, 225 Ill. 115; 80 N. E. 80; 10 L. R. A. (N. S.) 117.

[1] See Thompson *v.* Gould, 1838, 20 Pick. (Mass.) 134; Wilson *v.* Clark, 1880, 60 N. H. 352 (bill in equity).

[2] *Accord:* Anon., 1683, 2 Shower 283; Saunders *v.* Drew, 1832, 3 Barn. & Ad. 445. Prepaid passage money is likewise not recoverable in England: Gillan *v.* Simpkin, 1815, 4 Camp. 241.

[3] "Quasi-Contracts," p. 293.

ulations payable until earned, and is therefore not payable until the completion of the voyage, the parties by stipulating for the payment of freight in advance must have intended that as to the freight paid, the plaintiff should assume the risk of the voyage; that had they not so intended, there would be found in the charter party an express stipulation requiring the return of the freight so paid in the event of a failure to complete the voyage."

This reasoning, which would apply with equal force to the case of wages prepaid to one prevented from performing by illness or death, is not convincing. Mr. Justice BRETT, in *Allison* v. *Bristol Insurance Company*,[1] supports it by explaining that at least in the cases in which the practice of prepaying freight *arose*, the shipper received a special consideration for his assumption of the risk, the inference being that such assumption of risk was either expressly agreed upon or clearly understood.[2] But there is no evidence of a consideration for the alleged assumption of risk in *De Silvale* v. *Kendall*, and though consistently followed in England the rule in that case has been severely criticized:

Byrne v. Schiller, 1871, L. R. 6 Ex. 319: COCKBURN, C.J. (p. 325): "It is settled by the authorities referred to in the course of the argument, that by the law of England a payment made in advance on account of freight cannot be recovered back in the event of the goods being lost, and the freight therefore not becoming payable. I regret that the law is so. I think it founded on an erroneous principle and anything but satisfactory; and I am emboldened to say this by finding that

[1] 1875, 1 App. Cas. 209, 226.

[2] His words may be quoted: "Although I have said that this course of business may in theory be anomalous, I think its origin and existence are capable of a reasonable explanation. It arose in the case of the long Indian voyages. The length of voyage would keep the shipper far too long a time out of money; and freight is much more difficult to pledge as a security to third persons, than goods represented by a bill of lading. Therefore the shipper agreed to make the advance on what he would ultimately have to pay, and *for a consideration*, took the risk in order to obviate a repayment, which disarranges business transactions."

the American authorities have settled the law upon directly opposite principles, and that the law of every European country is in conformity to the American doctrine and contrary to ours. In France and Germany the rule has been settled for a long time. . . . But whatever may be the true principle, I quite agree that the authorities founded on the ill-digested case in Shower [Anon. 2 Show. 283] are too strong to be overcome; and if the law is to be altered, it must be done by the legislature and not by contrary decisions."

In America, as Lord COCKBURN remarked in the opinion just quoted, freight paid in advance is held to be recoverable in case the contract of carriage becomes impossible of performance.[1] There is said to be a distinction, however, between an agreement to *transport*, as consideration for the money advanced, and an agreement merely to *receive on board*. In the latter case the impossibility of completing the voyage does not affect the contract.[2]

[1] Pitman *v.* Hooper, 1837, 3 Sumn. (U. S. C. C.) 50; Fed. Cas., No. 11,185; Reina *v.* Cross, 1856, 6 Cal. 29; Griggs *v.* Austin, 1825, 3 Pick. (Mass.) 20; Chase *v.* Alliance Ins. Co., 1864, 9 Allen (Mass.) 311; Phelps *v.* Williamson, 1852, 5 Sandf. (N. Y. Superior Ct.) 578; Emery *v.* Dunbar, 1865, 1 Daly (N. Y. C. P.) 408. Prepaid passage money is likewise recoverable in America: Brown *v.* Harris, 1854, 2 Gray (Mass.) 359. But see Tweedie Trading Co. *v.* James P. McDonald Co., 1902, 114 Fed. 985, (recovery of prepaid ship hire denied where regulations of port of lading prevented carrier from taking on laborers).

[2] Watson *v.* Duykink, 1808, 3 Johns. (N. Y.) 335, 340, KENT, C.J.: "This agreement did not go to the length required by the *French* law of stipulating that the money should at all events be retained, but it was still particularly confined to the permission to be received on board, as a passenger, and to load the goods on board. Both these parts of the agreement were literally complied with. This can easily be distinguished from an agreement to transport and *deliver* at the place of destination. In the one case, the master places his compensation upon the actual carriage and delivery of the goods. The safe arrival of the subject is a condition precedent to the payment. In the other case the condition is rendered by receiving the goods on board, and making all due and *bona fide* efforts to carry and deliver them. I think this latter is, upon the whole, the better construction of the agreement before us, especially as the practice of retaining advance freight, in all such cases, must have been known to the parties, from the usage which has been found by the jury, and as the distinction

§ 130. (3) **Enforcement of restitution impracticable: Part payment of unapportionable consideration.** — It has been held that if, at the time the impossibility occurs, the plaintiff has received part of the consideration for his performance, and the consideration is not apportionable, he can recover nothing:

Whincup v. *Hughes*, 1871, L. R. 6 C. P. 78: Action to recover part of the premium paid to a master by the father of an apprentice. The master died during the term of service. BOVILL, C.J. (p. 81): "The general rule of law is, that where a contract has been in part performed no part of the money paid under such contract can be recovered back. There may be some cases of partial performance which form exceptions to this rule, as, for instance, if there were a contract to deliver ten sacks of wheat and six only were delivered, the price of the remaining four might be recovered back. But there the consideration is clearly severable. The general rule being what I have stated, is there anything in the present case to take it out of such rule? The master instructed the apprentice under the deed for the period of a year, and then died. It is clear law that the contract, being one of a personal nature, the death of the master, in the absence of any stipulation to the contrary, puts an end to it for the future. The further performance of it has been prevented by the act of God, and there is thus no breach of contract upon which any action will lie against the executor. That being so, can any action be maintained otherwise than upon the contract? The contract having been in part performed, it would seem that the general rule must apply unless the consideration be in its nature apportionable. I am at a loss to see on what principle such apportionment could be made. It could not properly be made with reference to the proportion which the period during which the apprentice was instructed bears to the whole term. In the early part of the term the teaching would be most onerous, and the services of

between an agreement to receive on board, and an agreement to transport and deliver, is not a new refinement, but can be traced back to the text of the civil law. The doctrine is recognized and adopted by various authors, that if the agreement be to pay freight for the *loading of the article on board*, the freight is due, though the article perish in the course of the voyage. This is the language of the civil law."

the apprentice of little value; as time went on his services would probably be worth more, and he would require less teaching." [1]

Pinkham v. *Libbey*, 1900, 93 Me. 575; 45 Atl. 823; 49 L. R. A. 693: Action to recover money paid under a contract by which the plaintiff agreed to pay the defendants $75, for the service of their stallion to a mare, "with the privilege of return for the season." The service proved fruitless, and the exercise of the "privilege of return" was prevented by the sickness and death of the stallion. WHITEHOUSE, J. (p. 578): "As before stated, the contract price was indivisible, and incapable of apportionment. The payment made by the plaintiff cannot, upon the facts of this case, be fairly deemed an overpayment. If, therefore, the plaintiff is entitled to recover anything, it must be the full amount of the contract price. But this would be unjust to the defendants. It is true the service actually had was ineffectual, and of no value to the plaintiff, but *non constat* that the privilege of return would have been of any value. The defendants made no engagement of warranty that any service would be successful." [2]

Upon principle, this limitation or rule is difficult to support. If, by "unapportionable consideration" is meant a

[1] In Ferns *v.* Carr, 1885, 28 Ch. Div. 409, it was held that the father of a solicitor's articled clerk could recover no part of the premium paid to the solicitor, the solicitor having died during the term of service. Professor Scott, in a note in his "Cases on Quasi-Contracts" (p. 614), reports an Ohio case as follows: "In McCammon *v.* Peck, 1895, 9 Oh. Ct. Ct. 589, the sum of $1500 was paid in advance to J. M. Jordan, a distinguished attorney of Cincinnati, to carry a case to final determination. After performing services of the admitted value of $250, Jordan died, and the client brought suit to recover the unearned portion of the fee. The Circuit Court permitted recovery, in what would seem to be an unanswerable opinion; but on appeal, the judgment was reversed, without opinion by the Supreme Court, evidently acting upon the advice of Lord MANSFIELD to 'decide promptly, but never give any reasons for your decisions. Your decisions may be right but your reasons are sure to be wrong.' The two cases [referring to Coe *v.* Smith, 1853, 4 Ind. 79] are one in principle, and recovery should have been permitted in the latter as well as in the former. In both instances, however, the courts stood by the profession." But see Callahan *v.* Shotwell, Admr., 1875, 60 Mo. 398.

[2] See also Bruce *v.* Indianapolis Gas Co., 1910, 46 Ind. App. 193; 92 N. E. 189.

consideration the executed part of which cannot be separately valued by reference to the terms of the contract alone — and this appears to be the interpretation of the English courts — the rule seems unreasonable. For why may not a jury ascertain the value of a defendant's part performance in these cases by evidence outside the contract, just as it is permitted thus to ascertain the value of a plaintiff's part performance in those cases in which it is the plaintiff, and not the defendant, who is prevented from fulfilling his engagement? If a consideration the executed part of which cannot be fairly valued by a jury is meant, the rule itself is not open to criticism; but in some of the cases it clearly has been misapplied. For while the value of the defendant's part performance may not always be ascertainable with mathematical exactness, it may be as closely approxi ated as the value of the plaintiff's part performance in the cases, above referred to, where it is the plaintiff who is prevented from going forward. It has been held, for example, that where an attorney is engaged to defend a cause for a certain sum but dies before the determination of the suit, his administrator may recover the value of the intestate's part performance.[1] Why, then, in case the attorney's fee is paid in advance, may not the client recover the amount paid, less the value of the attorney's part performance? In both cases precisely the same question goes to the jury — that of the value of the attorney's services; yet in the latter case it is said that there may be no recovery.[2] In the apprenticeship cases[3] the valuation of the master's part performance undoubtedly would be difficult; but in *Pinkham* v. *Libbey, supra*, it would have been a simple matter, one would think, to ascertain the value of the service of the defendant's stallion *without* the privilege of return, which is what the plaintiff received, and then to allow a recovery of the difference between the sum paid and that amount.

[1] Coe *v.* Smith, 1853, 4 Ind. 79; 58 Am. Dec. 618.

[2] McCammon *v.* Peck, 1895, 9 Ohio Circuit Ct. 589. See Scott, "Cases on Quasi-Contracts," p. 614 n. But see Callahan *v.* Shotwell, Admr., 1875, 60 Mo. 398, (allowing a recovery).

[3] Whincup *v.* Hughes, 1871, L. R. 6 C. P. 78.

§ 131. (4) **Enforcement of restitution unjust: Change of position.** — In some interesting cases arising from the postponement of the great coronation processions and naval review in 1902, the English courts held that money paid in advance for the use of rooms or the hiring of boats for the purpose of viewing the processions or review, was not recoverable:

Chandler v. *Webster*, [1904] 1 K. B. 493: Action to recover £100 paid in advance on account of rent of room hired "to view the first coronation procession on June 26, 1902." COLLINS, M.R. (p. 499): "The plaintiff contends that he is entitled to recover the money which he has paid on the ground that there has been a total failure of consideration. He says that the condition on which he paid the money was that the procession should take place, and that, as it did not take place, there has been a total failure of consideration. That contention does no doubt raise a question of some difficulty, and one which has perplexed the Courts to a considerable extent in several cases. The principle on which it has been dealt with is that which was applied in *Taylor* v. *Caldwell* [3 B. &. S. 826], — namely, that, where, from causes outside the volition of the parties, something which was the basis of, or essential to the fulfillment of the contract, had become impossible, so that, from the time when the fact of that impossibility has been ascertained, the contract can no further be performed by either party, it remains a perfectly good contract up to that point, and everything previously done in pursuance of it must be treated as rightly done, but the parties are both discharged from further performance of it. If the effect were that the contract were wiped out altogether, no doubt the result would be that money paid under it would have to be repaid as on a failure of consideration. But that is not the effect of the doctrine; it only releases the parties from further performance of the contract. Therefore the doctrine of failure of consideration does not apply. The rule adopted by the courts in such cases is, I think, to some extent an arbitrary one, the reason for its adoption being that it is really impossible in such cases to work out with any certainty what the rights of the parties in the event which happened should be. Time has elapsed, and the position of both parties may have more or less altered, and it is im-

possible to adjust or ascertain the rights of the parties with exactitude. That being so, the law treats everything that has already been done in pursuance of the contract as validly done, but relieves the parties of further responsibility under it." [1]

In the opinion just quoted, two reasons for denying restitution are advanced. The first, which is admitted to be an arbitrary one, is that in cases of the class of *Taylor* v. *Caldwell*, in which the parties are excused from further performance, the contract nevertheless continues to be "a good and subsisting contract with regard to things done," and to permit a recovery would be to fly directly in the face of such a contract. This, it is respectfully submitted, is a strange doctrine — that what was originally a contract for the payment of £141 in return for the use of a room, becomes upon the happening of an event which makes its complete performance impossible, "a good and subsisting contract" for the payment of £100 in return for nothing. The second reason, which is evidently regarded as explaining and supporting the arbitrary first one, is that it is impossible in such cases accurately to adjust the rights of the parties. "Time has elapsed," said the court, "and the position of the parties may have been more or less altered." It is true, of course, that the position of the parties *may* in some cases be so altered as to make restitution unjust; but it is believed that proof of such a change of position should be required to defeat a recovery.[2]

If the result reached by the court is to be upheld, the strongest ground would seem to be that in view of the nature of the contract and of the fact that the plaintiff paid in advance, he should

[1] *Accord:* Civil Service Coöp. Society *v.* General Steam Nav. Co., [1903] 2 K. B. 756; Blakely *v.* Muller and Hobson *v.* Pattenden, [1903] 2 K. B. 760, n.

[2] In commenting on these cases, the learned editor of the Law Quarterly Review said (20 Law Quart. Rev. 3): "We doubt whether the resources of the Common Law were not, at one time, capable of a nearer approximation to perfect justice; but the Court of Appeal has fixed the rule, and such cases are not very common, and it is always open to parties to protect themselves by insurance or by special terms in the contract itself."

be regarded as having voluntarily assumed the risk of postponement; such assumption of risk, as heretofore explained (*ante*, § 16), being incompatible with misreliance on the contract.[1]

[1] See 17 Harv. Law Rev. 199.

CHAPTER VIII

MISRELIANCE ON ILLEGAL CONTRACT

§ 132. In general.
§ 133. (I) Misreliance on contract: Assumption of risk.
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§ 135. (II) Enforcement of restitution against public policy.
§ 136. Same: Limitations of the doctrine.
§ 137. (1) Plaintiff ignorant of fact which makes contract illegal.
§ 138. (2) Plaintiff not *in pari delicto*.
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§ 140. (*a*) Where prohibition is aimed at defendant's act.
§ 141. (*b*) Where plaintiff is induced to contract by fraud or duress.
§ 142. Same: The doctrine criticized.
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§ 148, (III) Illegal transactions by agent: Rights of principal.
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§ 150. (V) Necessity of demand: Statute of limitations: Interest.
§ 151. (VI) Certain contracts separately considered:
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§ 152. (2) Wagering contracts.
§ 153. (3) Contracts made or to be performed on Sunday.

§ 132. **In general.** — Certain contracts which are regarded by the courts as obviously and seriously inimical to the interests of the state, as well as all contracts forbidden by the legislature, are said to be illegal. Statutory prohibitions are occasionally so construed as not wholly to invalidate, or render unenforceable, contracts entered into in violation of their provisions,[1] but as a general rule illegal contracts, although entered into by competent parties and possessing all of the internal essentials

[1] A conspicuous example is the case of *ultra vires* contracts of corporations. See *post*, § 154 *et seq.*

of validity, do not give rise to contractual obligation. The purpose of this chapter is to consider the quasi contractual obligation resulting from the part performance of contracts unenforceable because of illegality.[1]

§ 133. (I) **Misreliance on contract: Assumption of risk.** — If, in performing an illegal contract, one is unconscious of any question as to its legality, his performance may properly be said to be in misreliance on the contract (*ante*, § 10). And the fact that one's ignorance of the illegality of a transaction is due to his own negligence is generally immaterial (*ante*, § 15). But if one believes his contract to be illegal, or indeed is conscious of a doubt as to its legality, he assumes the risk and cannot be said to rely upon the contract (*ante*, § 16). No case arising out of an illegal contract has been found in which the denial of relief is placed squarely upon this ground. As in the case of contracts unenforceable because of the Statute of Frauds (*ante*, § 94), this is probably due in part to a failure to realize that the obligation to make restitution rests upon the doctrine of misreliance, and in part to the fact that, unless the question of legality is a subject of communication between the parties, the state of the plaintiff's mind on the question is difficult of satisfactory proof.

§ 134. **Same: Mistake of Law.** — Usually, in this class of cases, the mistake — if there be a mistake — is one of law. Such must inevitably be the case when the illegality of the contract results from the character of the contract itself or of the performance contemplated by it — as in gambling contracts or contracts to commit a crime. When the illegality results from the character or condition of the contractor, however, the mistake may be either one of law or one of fact. Thus, a contract by a corporation for the purchase of certain securities may be illegal, not because contracts for the purchase of such securities are unconditionally prohibited, but because the holding of such securities in excess of a certain limit is forbidden; and in such a case, the mistake of the plaintiff in selling the bonds in re-

[1] If the illegal contract is fully performed on both sides there is no basis for quasi contractual obligation. See Stansfield *v.* Kunz, 1901, 62 Kan. 797; 64 Pac. 614.

liance upon the *ultra vires* contract may arise either from ignorance of the prohibition — a mistake of law, — or ignorance of the extent of the company's holdings — a mistake of fact.

Although, in most jurisdictions, money paid under a mistake of law as a general rule may not be recovered (*ante*, § 35), the doctrine has rarely been applied to cases in which the mistake of law consisted of a mistake as to the legality of the contract in the performance of which the money was paid.[1]

§ 135. (II) **Enforcement of restitution against public policy.** — Under the influence of the oft quoted maxim *In pari delicto potior est conditio defendentis*, the courts have established what may be said to be a general rule, though not free from exceptions, that a benefit conferred by one who is a party to an illegal contract may not be recovered.[2]

[1] An instance of the denial of relief on the ground that the mistake as to the legality of the contract was a mistake of law is found in Valley R. Co. *v.* Lake Erie Iron Co., 1888, 46 Ohio St. 44; 18 N. E. 486; 1 L. R. A. 412, (*ultra vires* subscription to stock). And see Harse *v.* Pearl Life Assurance Co. [1904], 1 K. B. 558, (insurance contract illegal for want of insurable interest); *In re* Mutual, etc., Ins. Co., 1899, 107 Ia. 143; 77 N. W. 868, (*ultra vires* insurance contract).

[2] Browning *v.* Morris, 1778, Cowp. 790, (insurance on lottery tickets); Van Dyke *v.* Hewitt, 1800, 1 East 96, (premium paid for insurance to protect trade with enemy); Morck *v.* Abel, 1802, 3 Bos. & Pul. 35, (premium on goods loaded in violation of navigation laws); Taylor *v.* Chester, 1869, L. R. 4 Q. B. 309, (banknote deposited as security for debt arising on contract to furnish wine and supper for debauch in a brothel); Thomas *v.* City of Richmond, 1870, 12 Wall. (U. S.) 349, (money paid for illegal currency of State in rebellion); Dent *v.* Ferguson, 1889, 132 U. S. 50; 10 S. Ct. 13, (property transferred in fraud of creditors); Levy *v.* Kansas City, 1909, 168 Fed. 524; 93 C. C. A. 523; 22 L. R. A. (N. S.) 862, (money paid for a pool license); Edwards *v.* Randle, 1896, 63 Ark. 318; 38 S. W. 343; 36 L. R. A. 174; 58 Am. St. Rep. 108, (money paid in purchase of fixtures of post office, seller agreeing to resign and use his influence to secure appointment of buyer); Abbe *v.* Marr, 1859, 14 Cal. 210, (money paid in bet on fake horse race); Branham *v.* Stallings, 1895, 21 Colo. 211; 40 Pac. 396; 52 Am. St. Rep. 213, (money paid in lottery); Thompson Brothers *v.* Cummings, 1881, 68 Ga. 124, (margins in purchase of futures); Shaffner *v.* Pintchback, 1890, 133 Ill. 410; 24 N. E. 867; 23 Am. St. Rep. 624, (money paid to be used in wagering); Boddie *v.* Brewer Brewing Co., 1903, 204 Ill. 352; 68 N. E. 394, (money paid for rent of house for gambling purposes); White *v.* Wilson's Admrs.,

The reasons commonly given for this rule of policy may be stated as follows:

1. That it operates to inflict a deserved punishment upon the plaintiff for participating in an unlawful transaction.[1]

2. That it warns persons who contemplate illegal transactions that they enter upon them at their own risk and must bear any and all consequences that may result.[2]

3. That it saves the courts from the indignity of devoting their time and attention to the settlement of disputes between lawbreakers.[3]

4. That by closing the courts to lawbreakers, the suits of honest litigants are expedited.[4]

1897, 100 Ky. 367; 38 S. W. 495; 37 L. R. A. 197, (loan of money by participant in game to pay losses at cards); Smith *v.* Richmond, 1902, 114 Ky. 303; 70 S. W. 846, (money paid to be used for bribery); Chapman *v.* Haley, 1904, 117 Ky. 1004; 80 S. W. 190, (money paid for counterfeit money); Harvey *v.* Merril, 1889, 150 Mass. 1; 22 N. E. 49; 5 L. R. A. 200; 15 Am. St. Rep. 159, (money advanced by broker in contract for futures); Walhier *v.* Weber, 1905, 142 Mich. 322; 105 N. W. 772, (money paid for police immunity); Daimouth *v.* Bennett, 1853, 15 Barb. (N. Y. Sup. Ct.) 541, (money paid to compound a supposed felony); Edwards *v.* City of Goldsboro, 1906, 141 N. C. 60; 53 S. E. 652; 4 L. R. A. (N. S.) 589, (money paid to secure location of public building); Hooker *v.* DePalos, 1876, 28 Ohio St. 251, (money paid in lottery); Grant *v.* Ryan, 1872–73, 37 Tex. 37, (cattle sold under contract to pay for them in Confederate money); Miller *v.* Larson, 1865, 19 Wis. 463, (money paid on champertous contract).

[1] Bartle *v.* Nutt, 1830, 4 Pet. (U. S.) 184, 189, Mr. Justice BALDWIN: "The law leaves the parties to such a contract [to defraud the government] as it found them. If either has sustained a loss by the bad faith of a *particeps criminis*, it is but a just infliction for premeditated and deeply practiced fraud." See also McCullen *v.* Hoffman, 1899, 174 U. S. 639, 669; 19 S. Ct. 839.

[2] See Russell *v.* Courier Printing, etc., Co., 1908, 43 Colo. 321, 325; 95 Pac. 936, (influencing act of administrative officer).

[3] Tappenden *v.* Randall, 1801, 2 Bos. & Pul., 467, 471, HEATH, J.: "Undoubtedly there may be cases where the contract may be of a nature too grossly immoral for the court to enter into any discussion of it; as where one man has paid money by way of hire to another to murder a third person." Smith *v.* Richmond, 1902, 114 Ky. 303, 309; 70 S. W. 846, GUFFY, C.J.: "This does not seem to be the purpose for which the courts of this state are erected or are existing."

See also Bartle *v.* Nutt, 1830, 4 Pet. (U. S.) 184, 189.

[4] See Cooley, "Torts" (3d ed.), p. 261.

The rule has been severely criticized,[1] and the reasons stated above are not thoroughly convincing. As to the first, it is certainly both unscientific and unreasonable to punish a wrongdoer by permitting another wrongdoer to profit at his expense. As to the second, the effectiveness of the deterrent may be doubted, for the parties to contracts, whether lawful or unlawful, usually contemplate performance, and at the outset rarely weigh the consequences of a breach. The third and fourth are difficult of evaluation, but seem hardly adequate to support the rule. However, in view of the fact that the parties to unlawful contracts usually realize that they are unenforceable and therefore cannot be said to misrely upon them (*ante*, § 133), and in view of the limitations upon the rule, considered in the following sections, it is probable that there are comparatively few cases in which the rule works serious hardship.

§ 136. **Same: Limitations of the doctrine.** — The doctrine of the preceding section is generally regarded as inoperative:

1. When the plaintiff is ignorant of the fact which made the contract illegal.

[1] Professor Wigmore, in discussing the doctrine under consideration, says (25 Am. Law Rev. 712 n.): "But the whole notion is radically wrong in principle and produces extreme injustice. If A owes B $5000 why should he not pay it whether B has violated a statute or not? Where the issue is as to the rights of two litigants, it is unscientific to impose a penalty incidentally by depriving one of the litigants of his admitted right. It is unjust, also, for two reasons: first, one guilty party suffers, while another of equal guilt is rewarded; secondly, the penalty is usually utterly disproportionate to the offense. If there is one part of criminal jurisprudence which needs even more careful attention than it now receives it is the apportionment of penalty to offense. Yet the doctrine now under consideration requires, with monstrous injustice and blind haphazard, that the plaintiff shall be mulcted in the amount of his right, whatever that may be. Take for example the case of Cambriozo *v.* Maffet (2 Wash. C. C. 98), in which plaintiff and defendant were joint owners of a vessel. To avoid paying the tax on alien owners, the vessel was registered in the name of the defendant. For this illegality the plaintiff is denied the help of the courts in making the defendant account for the vessel's profits. In this way, and in a hundred similar ways, a fine of thousands of dollars may be imposed for petty violations of the law. One cannot imagine why we have so long allowed such an unworthy principle to remain."

2. When the plaintiff is not *in pari delicto* with the defendant.

3. When the plaintiff withdraws from the contract before its illegal purpose is accomplished.

§ 137. (1) **Plaintiff ignorant of fact which makes contract illegal.**—If the plaintiff, when he confers the benefit sought to be recovered, is ignorant of the *fact* which makes his contract illegal, relief will be afforded. If the defendant is aware of the fact which brings the contract within the inhibition of the law, it may be said that the parties are not *in pari delicto*. But even if the defendant, like the plaintiff, is ignorant of the fact, and consequently there is no difference in degree of guilt, the plaintiff will be permitted to recover:

Hentig v. *Staniforth*, 1816, 5 Maul. & Sel. 122: Action to recover premium paid on a policy of marine insurance. The voyage insured was illegal unless licensed. The plaintiff, residing abroad, sent a letter to his agent directing that a license be obtained, but the vessel carrying the letter was delayed by contrary winds and the license was not issued until after the voyage had commenced. The insurance policy had therefore been held void. Lord ELLENBOROUGH, C.J. (p. 125): "In the present case, a state of facts was supposed to exist, and reasonably so supposed, under which, if the expectation of the parties had been realized, the voyage would have been legal. Unfortunately for the plaintiff his expectation was disappointed, and he lost the benefit of his insurance; but he contemplated a legal voyage and a legal contract. And we think, therefore, that he is not a party to a violation of the law, and is entitled to recover back his premium, as money paid without consideration."

The plaintiff's ignorance or mistake as to the *law*, however, will not enable him to recover (see *ante*, § 134), even though it be due to the innocent misrepresentations of the defendant.[1]

§ 138. (2) **Plaintiff not in pari delicto.** — In the case of a contract *malum in se*, it is said, no difference in degree of delinquency will be recognized. Thus, one who hired another to

[1] Harse *v.* Pearl Life Assurance Co., [1904] 1 K. B. 558, (insurance illegal for want of insurable interest).

commit murder would not be allowed to recover the money paid, even though induced to contract by the false representations of the assassin. But where a contract is *malum prohibitum* only, the court may undertake to discriminate between the major and minor offender. This distinction is well put by WILDE, J., in *Lowell* v. *Boston and Lowell Railroad Corporation*:[1]

"In respect to offenses in which is involved any moral delinquency or turpitude all parties are deemed equally guilty, and courts will not inquire into their relative guilt. But where the offense is merely *malum prohibitum*, and is in no respect immoral, it is not against the policy of the law to inquire into the relative delinquency of the parties, and to administer justice between them, although both parties are wrongdoers."[2]

Accordingly, where the contract is *malum prohibitum* and the plaintiff is not *in pari delicto*, restitution will be enforced;[3] and this is true whichever party first repudiates the illegal transaction and whether or not the illegal purpose of the contract has been accomplished.[4]

[1] 1839, 23 Pick. (Mass.) 24, 32; 34 Am. Dec. 33.

[2] See also Smith *v.* Bromley, 1760, 2 Doug. 696, (money paid to secure signature of creditor to bankrupt's certificate); Kitchen *v.* Greenabaum, 1875, 61 Mo. 110, (lottery ticket); Tracy *v.* Talmage, 1856, 14 N. Y. 162; 67 Am. Dec. 132, (bank's illegal purchase of stock).

[3] Browning *v.* Morris, 1778, Cowp. 790, (premium paid for insurance of lottery tickets); Wenninger *v.* Mitchell, 1909, 139 Mo. App. 420; 122 S. W. 1130, (marriage brokage contract); Tracy *v.* Talmage, 1856, 14 N. Y. 162; 67 Am. Dec. 132, (bank's illegal purchase of stock). See also cases cited in following sections.

[4] Professor Keener treats of the obligation to make restitution where the parties are not *in pari delicto* under the caption: "Obligation of a Defendant in Default under a Contract unenforceable because of Illegality." This suggests that the doctrine may be invoked only when the defendant has refused or failed to perform; an implication which is followed by the express statement ("Quasi-Contracts," p. 275) that "it is necessary for the plaintiff to show a failure of consideration, and this he can do only by showing that the defendant has failed to perform a contract in exchange for which the benefit was conferred by the plaintiff." In many of the cases hereinafter cited, however, there is no evidence that the defendant was in default.

§ 139. **Same: Classification of cases in which plaintiff is not in pari delicto.** — The cases in which the plaintiff has been declared not to be *in pari delicto* may all be included, it is thought, within two classes, as follows:

1. Where the prohibition of a statute, or of the common law, under which the contract is declared illegal, is aimed at the act of the defendant and not at that of the plaintiff.

2. Where the plaintiff appears to have been induced to enter into the illegal contract by fraud, duress, oppression, or unfair dealing.

§ 140. (*a*) **Where prohibition is aimed at defendant's act.** — A statutory or common law prohibition under which a contract is held illegal may be said to be aimed at the act of the defendant rather than that of the plaintiff, either when it is primarily intended to restrain persons in the position of the defendant or of a class represented by the defendant, or when it is primarily intended to protect persons in the position of the plaintiff or of a class represented by the plaintiff. As illustrations of the former sort may be mentioned prohibitions against the sale of liquor [1] and prohibitions against the acceptance by banks of deposits to be repaid on a day certain.[2] If such prohibitions are violated, the liquor seller or the bank, as the case may be, is the real offender, not the purchaser of the liquor or the depositor, and money paid by such purchaser or depositor may be recovered. In the Kansas case of *Stansfield* v. *Kunz*,[3] in which a recovery of money paid under a contract to purchase a stock of liquor from a druggist, who was prohibited to sell liquor except for medical, mechanical, and scientific purposes or to one holding a druggist's permit, was allowed, the court said:

"The inhibition of the law is not upon the purchaser, but upon the seller; and if this agreement to sell had been consummated, plaintiff in error [seller] would have been guilty of a misdemeanor.

[1] Stansfield *v.* Kunz, 1901, 62 Kan. 797; 64 Pac. 614. See also Walan *v.* Kerby, 1868, 99 Mass. 1.

[2] White *v.* Franklin Bank, 1839, 22 Pick. (Mass.) 181.

[3] 1901, 62 Kan. 797, 800; 64 Pac. 614.

If it had been fully consummated, the court would not have relieved either party. Its illegality consists in the plaintiff in error contracting to sell a person to whom the law forbade him, and not in the purchaser contracting to purchase, because the law does not forbid him from so doing. The parties are therefore not in equal fault. The duty imposed by the law was imposed upon the plaintiff in error and not upon the defendant in error."

Illustrations of prohibitions primarily intended to protect persons in the position of the plaintiff or of a class represented by the plaintiff, are usury laws (*post*, § 223) and laws forbidding contracts by which a person is charged more than the statutory price for prosecuting a pension claim.[1] Of the same class is a statute making it unlawful to sell a patent right without filing copies of the letters patent together with an affidavit that the letters patent are genuine, have not been revoked or annulled, and that the vendor has full authority to sell. In an action by the buyer of a patent right to rescind his contract as illegal under the last mentioned statute, and to recover the value of property delivered and money paid in part performance of such contract, the Supreme Court of Kansas declared that the parties were not *in pari delicto* because, "the duties prescribed by the statute are imposed upon the vendor of patent rights, and are provided for the protection of purchasers.[2]

[1] Smart *v.* White, 1882, 73 Me. 332; 40 Am. Rep. 356; Ladd *v.* Barton, 1886, 64 N. H. 613; 6 Atl. 483.

[2] Mason *v.* McLeod, 1896, 57 Kan. 105, 110; 45 Pac. 76; 41 L. R. A. 548; 57 Am. St. Rep. 327.

In Smith *v.* Bromley, 1760, 2 Doug. 696, 697, action was brought to recover money paid under an illegal contract by which the defendant signed a certificate consenting to the discharge in bankruptcy of a relative of the plaintiff. Lord MANSFIELD, in allowing a recovery, said: "If the act is in itself immoral, or in violation of the general laws of public policy, there the party paying shall not have his action; for where both parties are equally criminal against such general laws, the rule is *potior est conditio defendentis*. But there are other laws, which are calculated for the protection of the subject against oppression, extortion, deceit, etc. If such laws are violated, and the defendant takes advantage of the plaintiff's condition or situation, there the plaintiff shall recover." *Cf.* Kearley *v.* Thomson, 1890, 24 Q. B. D. 742.

In many cases the intention of the legislature to discriminate between the parties to the prohibited transaction is evinced by the imposition of a penalty on one party only, or by the express limitation of the prohibition to the act of one party only:

Browning v. *Morris*, 1778, Cowp. 790: Action to recover premiums paid for illegal insurance of lottery tickets. Lord MANSFIELD (p. 793): "And it is very material that the statute itself, by the distinction it makes, has *marked* the *criminal:* For the penalties are all on *one* side; upon the *office-keeper.*" [1]

§ 141. (*b*) **Where plaintiff is induced to contract by fraud or constraint.** — The second class of cases in which one party is regarded as the lesser offender consists of those in which, al-

Laws prohibiting lotteries have likewise been held to be for the protection of one class from another. Jaques *v.* Golightly, 1776, 2 W. Bl. 1073; Browning *v.* Morris, 1778, Cowp. 790; Jaques *v.* Withy, 1788, 1 H. Bl. 65; Barclay *v.* Pearson, [1893] 2 Ch. 154; Gray *v.* Roberts, 1820, 2 A. K. Marsh. (9 Ky.) 208; 12 Am. Dec. 383; Mount *v.* Waite, 1811, 7 Johns. (N. Y.) 434. In Gray *v.* Roberts, *supra*, the court said (p. 209): "The Act of 1769, for preventing and suppressing private lotteries, which was the law in force at the time of the contract in this case, appears manifestly, from the preamble of the act, to have been designed by the legislature to protect the interest of others against the devices of those who should set up a lottery; and the enacting clause is made to operate upon the latter only. For it is only persons who set up the lottery, and not those who purchase the ticket, that offend against the provisions of the act."

[1] Also: Williams *v.* Hedley, 1807, 8 East 378, (usury); Stansfield *v.* Kunz, 1901, 62 Kan. 797; 64 Pac. 614, (liquor); Mason *v.* McLeod, 1896, 57 Kan. 105; 45 Pac. 76; 41 L. R. A. 548; 57 Am. St. Rep. 327, (patents); Gray *v.* Roberts, 1820, 2 A. K. Marsh. (9 Ky.) 208; 12 Am. Dec. 383, (lottery); Smart *v.* White, 1882, 73 Me. 332; 40 Am. Rep. 356, (pension claim); White *v.* Franklin Bank, 1839, 22 Pick. (Mass.) 181, (deposit in bank for time certain); Bateman *v.* Robinson, 1882, 12 Neb. 508; 11 N. W. 736, (sale of preëmption claim); Edgerly *v.* Hale, 1901, 71 N. H. 138; 51 Atl. 679, (excessive fees); Tracy *v.* Talmage, 1856, 14 N. Y. 162; 67 Am. Dec. 132, (bank's *ultra vires* purchase of stock); Curtis *v.* Leavit, 1857, 15 N. Y. 9, (banking loans); Burkholder *v.* Beetem's Admrs., 1870, 65 Pa. St. 496, (illegal sale of stock by bank cashier). See Walan *v.* Kerby, 1868, 99 Mass. 1, in which it appeared that the statute explicitly gave to the buyer of liquor sold in violation of law the right to recover payments made upon such purchase.

though the prohibition is not for the protection of one person against another, one is actually induced or constrained to enter into or to perform a prohibited contract by the fraud, duress or oppression of the other. Fraud is a tort and in some cases an action to recover the value of a benefit conferred in the performance of a contract induced by fraud is allowed as a remedy alternative to that of an action for damages (*post*, §§ 179, 281). Furthermore, not only fraud but duress and undue influence are always ground for rescinding a contract. The right to rescind usually implies the right to recover a benefit conferred before rescission; but when the contract is illegal one who seeks restitution encounters the rule of policy that courts will not assist a party to an illegal transaction. This obstacle is overcome by the doctrine of this section—that one who has been defrauded or unduly influenced is not *in pari delicto*. The doctrine has been relied upon in a variety of cases,—most frequently, perhaps, in actions to recover money paid or property transferred under contracts entered into for the purpose of stifling a threatened prosecution [1] or of obtaining the acceptance of a composition with creditors,[2] but occasionally in other cases.[3]

[1] Woodham *v.* Allen, 1900, 130 Cal. 194; 62 Pac. 398, (threatened prosecution of plaintiff's husband); Klein *v.* Pederson, 1902, 65 Neb. 452; 91 N. W. 281, (threatened prosecution of plaintiff); Corringe *v.* Reed, 1901, 23 Utah 120; 63 Pac. 902; 90 Am. St. Rep. 692, (threatened prosecution of plaintiff's husband); Hinsdell *v.* White, 1861, 34 Vt. 558, (threatened prosecution of plaintiff's son). And see Schoener *v.* Lissauer, 1887, 107 N. Y. 111; 13 N. E. 741, (threatened prosecution of plaintiff's son). *Contra:* Haynes *v.* Rudd, 1886, 102 N. Y. 372; 7 N. E. 287; 55 Am. Rep. 815, (threatened prosecution of plaintiff's son); Johnson *v.* Douglas, 1903, 32 Wash. 293; 73 Pac. 374, (money paid to secure dismissal of prosecution).

[2] Smith *v.* Cuff, 1817, 6 Maul. & Sel. 160; Atkinson *v.* Denby, 1861, 6 Hurl. & Nor. 778; 7 Hurl. & Nor. 934; Brown *v.* Everett, etc., Co., 1900, 111 Ga. 404; 36 S. E. 813.

[3] Osborne *v.* Williams, 1811, 18 Ves. Jr. 379, (sale of post office packet: illegal consideration secured by vendor); Wright *v.* Stewart, 1904, 130 Fed. 905, (*aff.* Stewart *v.* Wright, 1906, 147 Fed. 321; 77 C. C. A. 499), (fake foot race); *In re* Arnold Co., 1904, 133 Fed. 789, (money advanced for gambling); American Mutual Life Ins. Co. *v.* Bertram, 1904, 163 Ind. 51; 70 N. E. 258; 64 L. R A. 935, (assignment or insurance policy to person without insurable interest); Metropolitan

In *American Mutual Life Insurance Company* v. *Bertram*,[1] the plaintiff had been induced to take an assignment of a policy of insurance upon a life in which she had no insurable interest by the fraudulent representations of the officers and agents of the company that the policy was valid and that she would be entitled to recover upon it in case of loss, whereas in fact the policy had been issued originally without the knowledge of the person whose life was insured and to a person having no insurable interest therein. In an action to recover the assessments paid, the court said:

"It cannot be said that the parties to this transaction were *in pari delicto*, or that the appellant ought, in good conscience, to retain the moneys paid to it by the appellee. The representations made to the appellee by the officers and agents of the company — one of them being its vice president and treasurer — were calculated to impose upon and mislead any one contemplating the purchase of a policy previously issued by the company. The parties did not stand upon an equal footing, and the officers and agents making the false representations to the appellee had every advantage over her which their special knowledge of the facts of the case, and of the law of insurance applicable to their company could give."

In *Webb* v. *Fulchire*,[2] one who had bet that he could tell which of three cups covered a ball and had lost because of dishonest

Life Ins. Co. *v.* Blesch, 1900, 22 Ky. Law Rep. 530; 58 S. W. 436, (insurance policy without insurable interest); Musson *v.* Fales, 1820, 16 Mass. 332, (contract with alien enemy); Hess *v.* Culver, 1889, 77 Mich. 598; 43 N. W. 994; 6 L. R. A. 498; 18 Am. St. Rep. 421, (Bohemian oats: illegal bond); Prewett *v.* Coopwood, 1855, 1 George (30 Miss.) 369, (assignment to defraud alleged creditors); Ford *v.* Harrington, 1857, 16 N. Y. 285, (assignment to defraud creditors); Duval *v.* Wellman, 1891, 124 N. Y. 156; 26 N. E. 343, (marriage brokage); Webb *v.* Fulchire, 1843, 3 Ired. (25 N. C.) 485; 40 Am. Dec. 419, (pea game). *Contra:* Plaisted *v.* Palmer, 1874, 63 Me. 576, (assumpsit to recover back the price of a horse on account of fraud of the vendor: recovery denied because the sale was made on Sunday); Kitchen *v.* Greenabaum, 1875, 61 Mo. 110, *semble*.

[1] 1904, 163 Ind. 51, 62; 70 N. E. 258; 64 L. R. A. 935.

[2] 1843, 3 Ired. (25 N. C.) 485, 486; 40 Am. Dec. 419.

manipulation by the winner was allowed to recover the money paid. Said RUFFIN, C.J.:

"It is not denied that the law gives no action to a party to an illegal contract, either to enforce it directly, or to recover back money paid on it after its execution. Nor is it doubted, that money fairly lost at play at a forbidden game and paid, cannot be recovered back in an action for money had and received. But it is perfectly certain, that money, won by cheating at any kind of game, whether allowed or forbidden, and paid by the loser without knowledge of the fraud, may be recovered. . . . Surely, the artless fool, who seems to have been alike bereft of his senses and his money, is not to be deemed a partaker in the same crime, *in pari delicto*, with the juggling knave, who gulled and fleeced him."

In the last mentioned case, it may be noted, the fraud which led the court to hold that the parties were not *in pari delicto* was not in the inducement to contract which the defendant held out to the plaintiff, but was committed after the contract had been entered into. In other cases of a like character, the same conclusion has been reached,[1] but in *Babcock* v. *Thompson*[2] the Supreme Court of Massachusetts declared that one who, by entering an unlawful gambling game, "puts himself in a condition to be cheated," will not be assisted by the court but must look out for himself.

§ 142. **Same: The doctrine criticized.** — The rule that one who has been induced by fraud or forced by some sort of constraint to enter into an unlawful contract will be relieved from his engagement and allowed to recover money or property

[1] Catts *v.* Phalen, 1844, 2 How. (U. S.) 376, (lottery prize paid for a ticket fraudulently drawn); Northwestern Mut. Life Ins. Co. *v.* Elliott, 1880, 7 Saw. (U. S. C. C.) 17, 5 Fed. 225, (money paid on an illegal insurance policy upon fraudulent representations of death of insured); Stewart *v.* Wright, 1906, 147 Fed. 321; 77 C. C. A. 499, (money wagered on a fake foot race); Hobbs *v.* Boatright, 1906, 195 Mo. 693; 93 S. W. 934; 5 L. R. A. (N. S.) 906; 113 Am. St. Rep. 709, (money wagered on a fake foot race).

[2] 1826, 3 Pick. (Mass.) 446, 449; 15 Am. Dec. 235, (gambling). See also Schmitt *v.* Gibson, 1910, 12 Cal. App. 407; 107 Pac. 571, (fake fight).

with which he has parted in its performance, is probably salutary. But the reason usually given for the rule — that the parties to such a contract are not *in pari delicto* — is unsatisfactory. One who is constrained to make an unlawful contract by duress or undue influence, it is true, is not an intentional offender against the law. The same may be said of one who is induced by fraudulent representations of a character that conceals the illegality of the transaction. Thus, a British subject who is induced to contract with an American during a war between England and the United States by the representation of the American that he is a subject of Spain, is not a wilful law-breaker.[1] But one who, although induced to contract by fraud, is fully aware that he is embarking upon an unlawful adventure, offends just as seriously as if there were no fraud. For example, one who deliberately enters into a contract for the purpose of defrauding his creditors is by no means absolved from blame by the fact that he is persuaded to make the contract by false representations as to the condition of his estate.[2] It may be contended that while in such a case the offense of the victim is not mitigated by the fraud, the offense of the perpetrator is aggravated. Perhaps this justifies the conclusion that the parties to an illegal contract tainted with fraud or improper constraint are not *in pari delicto*. It would seem, however, that the real underlying reason for permitting a recovery in all cases of fraud or constraint is not that the plaintiff's delinquency is less than the defendant's, but that the policy of denying relief to parties who have engaged in unlawful transactions is overborne by the more important policy of protecting persons from fraud, duress, and undue influence. In other words, the true doctrine is that one whose consent to a contract or to the performance of a contract is secured by fraud or constraint will not be denied the assistance of the courts in obtaining restitution, even though in making the contract he wittingly or unwittingly violates the law. This theory of the rule, while not generally accepted, appears to have been adopted by the

[1] See Musson *v.* Fales, 1820, 16 Mass. 332.

[2] See Prewett *v.* Coopwood, 1855, 1 George (30 Miss.) 369.

Supreme Court of the United States in the case of *National Bank and Loan Company* v. *Petrie*,[1] in which Mr. Justice HOLMES said:

"The right not to be led by fraud to change one's situation is anterior to and independent of the contract. The fraud is a tort. Its usual consequence is that as between the parties the one who is defrauded has the right, if possible, to be restored to his former position. That right is not taken away because the consequence of its exercise will be the undoing of a forbidden deed. That is a consequence to which the law can have no objection, and the fraudulent party, who otherwise might have been allowed to disclaim any different obligation from that with which the other had been content, has lost his right to object because he has brought about the other's consent by wrong." [2]

§ 143. **Order of proof as test of par delictum.** — There are occasional *dicta* to the effect that no claim will be allowed by the courts which cannot be established without proof of an illegal transaction.[3] In most of the cases the claim sought to

[1] 1903, 189 U. S. 423, 425; 23 S. Ct. 512, (unauthorized purchase of bonds by bank officer).

[2] See also Kiewert *v.* Rindskopf, 1879, 46 Wis. 481, 484; 1 N. W. 163, (money obtained to be paid on an illegal contract). But see Plaisted *v.* Palmer, 1874, 63 Me. 576, (sale of horse on Sunday); Robeson *v.* French, 1846, 12 Met. (Mass.) 24; 45 Am. Dec. 236, (horse trade on Sunday); Northrup *v.* Foot, 1835, 14 Wend. (N. Y.) 248, (sale of horse on Sunday).

[3] See Simpson *v.* Bloss, 1816, 7 Taunt. 246, (wager); Fivaz *v.* Nicholls, 1846, 2 C. B. 501, (agreement to suppress prosecution); McMullen *v.* Hoffman, 1898, 174 U. S. 639, 654; 19 S. Ct. 839, (secret agreement between bidders); Butler *v.* Agnew, 1908, 9 Cal. App. 327, 332; 99 Pac. 395, (secret agreement between vendor's agent and purchaser); Roselle *v.* Beckemeir, 1896, 134 Mo. 380; 35 S. W. 1132, (lottery); Woodworth *v.* Bennett, 1871, 43 N. Y. 273; 3 Am. Rep. 706, (illegal agreement between bidders); Swan *v.* Scott, 1824, 11 Serg. & R. (Pa.) 155, (land lottery); Columbia Bank, etc., Co. *v.* Haldeman, 1844, 7 Watts & Serg. (Pa.) 233; 42 Am. Dec. 229, (bond to indemnify stakeholder); Holt *v.* Green, 1873, 73 Pa. St. 198; 13 Am. Rep. 737, (violation of revenue law; *cf.* Johnson *v.* Hulings, 1883, 103 Pa. St. 498; 49 Am. Rep. 131, sale by unlicensed broker); Packer & Field *v.* Byrd, 1905, 73 S. C. 1; 51 S. E. 678; 6 L. R. A. (N. S.) 547, (monopoly); Wald's Pollock, "Contracts" (Williston's ed.), 497.

be enforced was for the breach of the illegal contract itself or of a contract collateral to or in some way connected with the illegal contract. But in *Taylor* v. *Chester*,[1] the rule was applied to a claim sounding in quasi contract, and it was declared that "The true test for determining whether or not the plaintiff and the defendant were in pari delicto is by considering whether the plaintiff could make out his case otherwise than through the medium and by the aid of the illegal transaction." [2]

Whether or not the rule is of value in determining the enforceability of contracts collateral to or indirectly relating to illegal transactions,[3] as a test for determining the question of *par delictum* it has been condemned by judges and commentators alike and is obviously without merit.[4] Aside from its artificiality in subordinating a question of substance to one of form, it would unquestionably operate with marked inequality and injustice. In many cases the rule would prevent the relief of persons who are the victims of actual fraud or oppression, or who are intended to be protected by the law which makes the contract illegal. For in order to establish the right to restitution, a plaintiff must prove the circumstances under which he conferred the benefit. This means that he must put the contract in evidence, and if the contract were unlawful on its face he would thereby establish the fact that he was *in*

[1] 1869, L. R. 4 Q. B. 309, (wine supplied to brothel). See also Herman *v.* Jeuchner, 1885, 15 Q. B. D. 561, (indemnity of surety); Short *v.* Bullion-Beck, etc., Co., 1899, 20 Utah 20; 57 Pac. 720; 45 L. R. A. 603, (contract in violation of eight-hour law).

[2] Opinion of MELLOR, J., p. 314.

[3] In Hanauer *v.* Woodruff, 1872, 15 Wall. (U. S.) 439, 443, an action upon a note given in consideration of illegal bonds, the Supreme Court declared that this test "is too narrow in its terms and excludes many cases where the plaintiff might establish his case independently of the illegal transaction, and yet would find his demand tainted by that transaction." See also Coppell *v.* Hall, 1868, 7 Wall. (U S.) 542; Baltimore, etc., R. Co. *v.* Diamond Coal Co., 1899, 61 Ohio St. 242; 55 N. E. 616.

[4] Plaisted *v.* Palmer, 1874, 63 Me. 576, (sale of horse on Sunday); Sampson *v.* Shaw, 1869, 101 Mass. 145; 3 Am. Rep. 327, (agreement, for a corner); Keener, "Quasi-Contracts," p. 275; Scott, "Cases on Quasi-Contracts," p. 686, note.

pari delicto, regardless of the circumstances of the formation of the contract and of the purpose of the law in prohibiting it. Occasionally, on the other hand, it would enable the plaintiff to recover though in reality quite as guilty as the defendant. For instance, if A were to pay money to B under a lawful contract, but subsequently were to agree with B that B should expend it in an unlawful joint attempt to make a "corner" in a certain stock, A might obtain relief upon the ground that he was not *in pari delicto*. He would establish a claim against B by proving the lawful contract, and although B were to put in evidence the unlawful contract subsequently entered into, the court would be obliged to hold that A, since he did not resort to the illegal contract to prove his case, was not as guilty as B.[1]

§ 144. (3) **Plaintiff withdraws before accomplishment of illegal purpose: Locus pœnitentiæ.** — It is frequently said that one who pays money or transfers property under a contract *malum prohibitum* may recover the same if he rescinds the illegal contract before it is executed.[2] A more accurate statement of the rule, however, is that one who withdraws before the illegal object is accomplished is entitled to recover.[3] For

[1] See Sampson *v.* Shaw, 1869, 101 Mass. 145; 3 Am. Rep. 327. In this case the court said (p. 152): "The application of the maxim, *in pari delicto*, etc., does not depend upon any technical rule as to which party is the first to urge it upon the court in the pleadings."

[2] Lowry *v.* Bourdieu, 1780, Doug. 468, 471, (insurance without interest); Tappenden *v.* Randall, 1801, 2 Bos. & Pul. 467, 471, (wager); Spring Co. *v.* Knowlton, 1880, 103 U. S. 49, 60, (*ultra vires* issue of stock); McCutcheon *v.* Merz Capsule Co., 1896, 71 Fed. 787, 795; 19 C. C. A. 108; 37 U. S. App. 586, (*ultra vires* agreement to combine); White *v.* Franklin Bank, 1839, 22 Pick. (Mass.) 181, (*ultra vires* contract of bank); Skinner *v.* Henderson, 1846, 10 Mo. 205, 207, (lease of preëmption right); Brown *v.* Timmany, 1851, 20 Ohio 81, 86, (Sunday contract); Bernard *v.* Taylor, 1893, 23 Or. 416, 422; 31 Pac. 968; 18 L. R. A. 859; 37 Am. St. Rep. 693, (wager on foot race); McCall *v.* Whaley, 1909, 52 Tex. Civ. App. 646; 115 S. W. 658, (contract to influence a public officer); Deaton *v.* Lawton, 1905, 40 Wash. 468; 82 Pac. 879, 880; 111 Am. St. Rep. 922, (contract by unlicensed physician to render services).

[3] Taylor *v.* Bowers, 1876, 1 Q. B. D. 291, 300, (delivery of goods to defraud creditors); Herman *v.* Jeuchner, 1885, 15 Q. B. D. 561, (indemnity of surety: overruling Wilson *v.* Strugnell, 1881, 7 Q. B. D. 548, in which it was held that plaintiff could recover because the contract

the true purpose of this exception to the general rule is to prevent, not the execution of the contract, but — what may be quite different — the consummation of the contemplated violation of law. Thus, one who enters into a contract on Sunday, in violation of the statute, should under no circumstances be permitted to recover, for the violation of law is complete the moment the contract is made (*post*, § 153). So, one who, for the purpose of enabling a company to have a fictitious credit in case of inquiries at their bankers, places money to their credit under an agreement that it shall not be used for the general purposes of the company but returned to the lender, cannot recover the money upon the company becoming insolvent.[1]

This opportunity to withdraw from an illegal contract and recover the value of a benefit conferred in its performance is called *locus pœnitentiæ*. It exists without reference to the question of *par delictum*,[2] being offered, not for the purpose of saving the plaintiff from hardship, but with the hope of preventing the violation of law. The wisdom of the doctrine has occasionally been doubted,[3] and in a few cases it has been

had not been executed); Wasserman *v.* Sloss, 1897, 117 Cal. 425, 430; 49 Pac. 566; 38 L. R. A. 176; 59 Am. St. Rep. 209, (stocks advanced for bribery); Eastern Expanded Metal Co. *v.* Webb, etc., Co., 1907, 195 Mass. 356; 81 N. E. 251, (labor and materials furnished in construction of lower part of building: plans for roof contravened statute).

[1] *In re* Great Berlin Steamboat Co., 1884, 26 Ch. D. 616, 620, ("The object," said LINDLEY, L.J., "for which the advance was made was attained as the company continued to have a fictitious credit till the commencement of the winding-up. After that I think it was too late for the Appellant to repudiate the bargain and claim the money."). See also Herman *v.* Jeuchner, 1885, 15 Q. B. D. 561.

[2] Spring Co. *v.* Knowlton, 1880, 103 U. S. 49, 60. In this case WOODS, J., said: "The rule is applied in the great majority of cases, even when the parties to the illegal contract are *in pari delicto*, the question which of the parties is more blamable being often difficult of solution and quite immaterial."

This is not always understood. See Wright *v.* Stewart, 1904, 130 Fed. 905.

[3] See Kearley *v.* Thomson, 1890, 24 Q. B. D. 742, 746, (Money paid to secure discharge in bankruptcy. "It is remarkable," says FRY, L.J., after quoting from the opinion of MELLISH, L.J., in Taylor *v.* Bowers, 1. Q. B. D. 291, "that this proposition is, as I believe, to be found in no

flatly rejected,[1] but in one or the other of the two forms in which it is stated above, it has been very generally adopted.

§ 145. **Same: The doctrine criticized.** — Professor Harriman contends[2] that the accomplishment or non-accomplishment of the illegal purpose is not a satisfactory test for determining whether or not one who rescinds should be allowed to recover:

"Thus if money is paid to induce one to commit a crime, to allow the recovery of the money before the commission of the crime would tend to induce the recipient of the money to commit the crime, and thereby insure the retention of the money; while if A were to transfer a ship to B in order that B might commit piracy, to allow A to recover the ship would tend to prevent the crime by depriving B of the means of committing piracy."

This distinction between the case of money paid or goods delivered in consideration of an illegal promise and that of money paid or goods delivered to be used as the instrument or means of accomplishing an illegal object was previously suggested by Sir William Anson in his treatise on contracts,[3]

earlier case than *Taylor* v. *Bowers*, which occurred in 1867, and, notwithstanding the very high authority of the learned judge who expressed the law in the terms which I have read, I cannot help saying for myself that I think the extent of the application of that principle, and even the principle itself, may, at some time hereafter, require consideration, if not in this Court, yet in a higher tribunal; and I am glad to find that in expressing that view I have the entire concurrence of the Lord Chief Justice.").

[1] Smith *v.* Richmond, 1902, 114 Ky. 303; 70 S. W. 846; 102 Am. St. Rep. 283, (money for bribes); Chapman *v.* Haley, 1904, 117 Ky. 1004; 80 S. W. 190, (sale of counterfeit money); Knowlton *v.* Congress, etc., Spring Co., 1874, 57 N. Y. 518, (but see Spring Co. *v.* Knowlton, 1880, 103 U. S. 49: *ultra vires* increase of stock).

[2] Harriman, "Contracts," § 240.

[3] See 4th ed., p. 200. "If A gives X £1000 in consideration of X undertaking to blow up Westminster Abbey or to write and publish a series of defamatory notices of M, it is assumed that A could not recover that money though at the end of six months Westminster Abbey was unharmed or the notices unwritten, and though X had the money at his bankers. But if A were to place £1000 to the account of X with a banker in order that X might buy dynamite to blow up Westminster Abbey, or purchase a share in the management of a newspaper with a

but in the later editions of the book the point is not touched upon.[1] The distinction, it is believed, is not well taken. It is true that one's intent to commit an offense against the law is more likely to be forestalled by depriving him of the means of committing it than merely by requiring the return of the consideration received by him. But it is not true that to require the return of the consideration " would tend to induce the recipient of the money to commit the crime, and thereby insure the retention of the money." For the rule is not that the consummation of the illegal purpose before judgment of restitution, or before the commencement of the action, will defeat a recovery. The right to restitution arises at the instant of rescission, and the subsequent commission of the contemplated offense by the other party will not " insure the retention of the money." It may be argued that knowledge of the doctrine and the consequent fear of rescission may lead the recipient of the money or goods to secure himself by hastening to perform his unlawful undertaking before the other party repents. But if the right to restitution is denied, the recipient of the money or goods may carry out the illegal transaction at his leisure. Moreover, this consideration is offset by another of equal importance — that such knowledge of the doctrine and consequent fear of rescission tends to prevent the formation of illegal contracts.

It is submitted, therefore, that while the doctrine is in no case certain to avert the violation of law, it tends so to do; and that this is true in the case of money or goods furnished in consideration of an unlawful undertaking as well as in that of money or goods furnished as a means of affecting an unlawful end.

§ 146. **Same: Illegal purpose accomplished in part.** — The accomplishment of any part of the illegal purpose, it seems, effectively cuts off the right to recover:

view to the defamation of M; and if A changed his mind before the execution of the contract, it is presumed that he might recover so much of the £1000 as had not been spent on the illegal objects contemplated. To allow an action to be brought on the first of these cases would tend 'to enforce the illegal transaction,' in the second case it would tend to prevent the illegal object from being carried out."

[1] See Huffcut's 2d Am. copyright ed., pp. 266, 267.

Kearley v. *Thomson*, 1890, 24 Q. B. D. 742: Action to recover money paid by the plaintiff, a friend of a bankrupt, to the defendants, solicitors of the petitioning creditor, on their undertaking not to appear at the public examination of the bankrupt, and not to oppose his discharge. FRY, L.J. (p. 746): "What is the condition of things if the illegal purpose has been carried into effect in a material part but remains unperformed in another material part? As I have already pointed out in the present case, the contract was that the defendants should not appear at the public examination of the bankrupt or at the application for an order of discharge. It was performed as regards the first; but the other application has not yet been made. Can it be contended that, if the illegal contract has been partly carried into effect and partly remains unperformed, the money can still be recovered? In my judgment it cannot be so contended with success. Let me put an illustration of the doctrine contended for, which was that partial performance did not prevent the recovery of the money. Suppose a payment of £100, by A to B on a contract that the latter shall murder C and D. He has murdered C, but not D. Can the money be recovered back? In my opinion it cannot be. I think that case illustrates and determines the present one."

Ullman v. *St. Louis Fair Assn.*, 1902, 167 Mo. 273; 66 S. W. 949; 56 L. R. A. 606: Action to recover money paid under an illegal contract for the purchase of betting privileges at a race track. The plaintiffs enjoyed for a short time the privileges purchased by them. GANTT, J. (p. 287): "It is only when the contract remains wholly unexecuted on one side, and where, by its abandonment, the acts which the law forbids will be averted, that the courts will lend a willing ear to the repentant party, and if he has paid money in advance, will permit its recovery; but when, as in this case, he has carried into effect the unlawful design, and in part, at least, violated the law in furtherance of such contract, the time for repentance has passed in which the law will let him recover moneys which he has embarked in the enterprise." [1]

[1] Also: Arnot *v.* Pittston, etc., Co., 1877, 68 N. Y. 558; 23 Am. Rep. 190, (agreement to bull the market); Edwards *v.* Goldsboro, 1906, 141 N. C. 60; 53 S. E. 652; 4 L. R. A. (N. S.) 589, (A city made an illegal contract with certain property owners, whereby a city hall and market

The wisdom of this limitation may be doubted. The court, it is true, may not hope altogether to avert the violation of law by allowing a withdrawal and recovery after the illegal purpose has been in part accomplished, but it may hope to avert a renewal or continuation of the violation of law, whereas to deny a recovery would tend to have the opposite effect. There are a few cases in which the limitation is disregarded.[1]

§ 147. **Same: Illegal purpose thwarted.** — A recovery will not be permitted, even though no part of the illegal purpose has been accomplished, if it appears that by reason of the intervention of the authorities or the action of a third person the accomplishment of the illegal purpose is impossible:

Shattuck v. *Watson*, 1890, 53 Ark. 147; 13 S. W. 516; 7 L. R. A. 551: Suit to cancel mortgages given by a father in consideration of a promise not to prosecute his son for forgery. The son was prosecuted through other agencies. HEMINGWAY, J. (p. 152): "But conceding that there was a time when the appellee might have withdrawn from his illegal compact, removed the obstacle he had placed in the way of justice and recovered the securities, he never sought to do it, until the illegal purpose failed from other causes, and his agreement no longer thwarted justice."

This brings out, in clear relief, the object of the rule of *locus pœnitentiæ*. It is not to aid the penitent, but to avert, if possible, the violation of law. Where it is found that the parties are helpless to execute their unlawful plans, the court ceases to concern itself with the matter.

house were to be erected by the city. The city erected the city hall but not the market house. Held: the property owners could not recover money paid under the contract.); Hooker *v.* De Palos, 1876, 28 Ohio St. 251, (land lottery); Sauerhering *v.* Rueping, 1909, 137 Wis. 407; 119 N. W. 184, 187, (*ultra vires* contract of corporation). And see St. Louis, etc., R. Co. *v.* Terre Haute, etc., R. Co., 1892, 145 U. S. 393, 407; 12 S. Ct. 953, (*ultra vires* lease).

[1] Block *v.* Darling, 1890, 140 U. S. 234; 11 S. Ct. 832, (deposit in fraud of creditors). And see cases cited, *post*, § 148, holding that, although part of a sum of money paid by a principal to his agent to be used for an illegal purpose has actually been expended by the agent in furtherance of the illegal purpose, the balance may be recovered.

§ 148. (III) **Illegal transactions by agent: Rights of principal.** — Money paid by a principal to his agent to be used in violation of law, and remaining in the agent's hands, may be recovered.[1] Even if part of the money has been paid over or expended by the agent in furtherance or accomplishment of the illegal purpose the balance is recoverable.[2] Indeed, there are many cases which go to the extent of holding the agent responsible to his principal for money received by him from a third person as the proceeds of an executed illegal contract.[3]

[1] Wasserman *v.* Sloss, 1897, 117 Cal. 425; 49 Pac. 566; 38 L. R. A. 176; 59 Am. St. Rep. 209, (stocks advanced for bribery); Morgan *v.* Groff, 1848, 4 Barb. (N. Y. Sup. Ct.) 524, (money given agent to bet and misappropriated); Smith *v.* Blackley, 1898, 188 Pa. St. 550; 41 Atl. 619; 68 Am. St. Rep. 887, (alleged abortion: here the principals were not *in pari delicto* with their agent, being induced to employ him in the proposed illegal transaction by his false and fraudulent representations); Kiewert *v.* Rindskopf, 1879, 46 Wis. 481; 1 N. W. 163, (money given agent to make payment on illegal contract). But see Smith *v.* Richmond, 1902, 114 Ky. 303; 70 S. W. 846; 102 Am. St. Rep. 283, (bribery).

[2] Bone *v.* Ekless, 1860, 5 Hurl. & Nor. 925, (bribe); Benton *v.* Singleton, 1902, 114 Ga. 548; 40 S. E. 811; 58 L. R. A. 181, (cotton on margin); Hardy *v.* Jones, 1901, 63 Kan. 8; 64 Pac. 969; 88 Am St. Rep. 223, (suppressing competition at sale); Ware *v.* Spinney, 1907, 76 Kan. 289; 91 Pac. 787; 13 L. R. A. (N. S.) 267, (inducing violation of trust); Sampson *v.* Shaw, 1869, 101 Mass. 145; 3 Am. Rep. 327, (corner in stock); Peters *v.* Grim, 1892, 149 Pa. St. 163; 24 Atl. 192; 34 Am. St. Rep. 599, (stock on margin).

[3] Tenant *v.* Elliott, 1797, 1 Bos. & Pul. 3, (insurance money on foreign ship); McMullen *v.* Hoffman, 1899, 174 U. S. 639; 19 S. Ct. 839, (suppressing competition at sale); Caldwell *v.* Harding, 1869, 1 Low. (U. S. C. C.) 326; Fed. Cas., No. 2302, (insurance on enemy's vessel); First Nat. Bank *v.* Leppel, 1886, 9 Colo. 594; 13 Pac. 776, (note in fraud of creditors); Brady *v.* Horvath, 1897, 167 Ill. 610; 47 N. E. 757, (lottery); Wilt *v.* Town of Redkey, 1902, 29 Ind. App. 199; 64 N. E. 228, (illegal sale of municipal bonds); Willson *v.* Owen, 1874, 30 Mich. 474, (horse racing); Gilliam *v.* Brown, 1870–71, 1 Morris (43 Miss.) 641, (trade with enemy); Roselle *v.* Beckemeir, 1896, 134 Mo. 380; 35 S. W. 1132, (proceeds of lottery ticket); Evans *v.* Trenton, 1853, 24 N. J. L. 764, (municipal funds raised illegally); Norton *v.* Blinn, 1883, 39 Ohio St. 145, (futures); Hertzler *v.* Geigley, 1900, 196 Pa. St. 419; 46 Atl. 366; 79 Am. St. Rep. 724, (illegal sale of liquor); Monongahela Nat. Bank *v.* First Nat. Bank, 1910, 226 Pa. St. 270; 75 Atl. 359, (fraud); Tate *v.* Pegues, 1887, 28 S. C. 463, (untagged fertilizer); Baldwin *v.* Patter, 1874, 46 Vt. 402, (boxes of candy containing prizes); Cheuvront *v.*

In support of this last rule it is sometimes argued that since the action is based upon the receipt by the agent of money belonging to his principal, the illegality of the contract is irrelevant. If this is the true ground of recovery, the rule applies to the case of a contract *malum in se* as well as to that of a contract *malum prohibitum*. Another reason, though one not often clearly expressed, is that the policy of requiring of an agent the strictest fidelity to the interests of his principal outweighs that of denying relief to a participant in an illegal transaction. As was said by McILVAINE, J., in *Norton* v. *Blinn*:[1]

"It is contrary to public policy and good morals, to permit employees, agents or servants to seize or retain property of their principal, although it may be employed in illegal business and under their control. No consideration of public policy can justify a lowering of the standard of moral honesty required of persons in these relations."

In some cases, a distinction is made between a case in which the illegal business is transacted by the defendant agent and one in which such agent is not a participant in the illegal transaction, but is merely a channel through which the proceeds are to be delivered to the principal. In the former, it is argued, the payment over of the money collected by the agent is an inseparable part of the unlawful undertaking, and therefore to compel such payment over would be practically to enforce the performance of an illegal contract, while in the latter the illegal transaction is completely executed when the money reaches the agent's hands and there is consequently no object in denying a recovery against him:

Horner, 1907, 62 W. Va. 476; 59 S. E. 964, (fraudulent conveyance); Hurd *v.* Doty, 1893, 86 Wis. 1; 56 N. W. 371; 21 L. R. A. 746, (insurance money on life in which plaintiff had no interest). See Ruemmeli *v.* Cravens, 1903, 13 Okl. 342; 74 Pac. 908, (sale of liquor).

[1] 1883, 39 Ohio St. 145, 149. See also Lovejoy *v.* Kaufman, 1897, 16 Tex. Civ. App. 377; 41 S. W. 507, in which the court said: "The illegality of the contract . . . in no wise lessens his responsibility as agent."

Lemon v. *Grosskopf*, 1868, 22 Wis. 447; 99 Am. Dec. 58: Action to recover from an agent the proceeds of the sale of tickets in a lottery scheme. Some of the tickets had been sold by the defendant and the remainder by Kilgore, another agent of the plaintiff, who had turned over to the defendant the money collected by him. COLE, J. (p. 452): "Here the defendant was employed by the plaintiff to sell these lottery tickets, receive and retain the money from them until he became satisfied that the drawing of the prizes in the scheme was fairly conducted, and then account to the plaintiff. It was as well a part of his agency to receive and account for the money, as to sell the tickets. And an action to recover this money goes in affirmance of the illegal contract, and to enforce the performance of this duty. . . . But the money which the defendant received from Kilgore stands upon different grounds. So far as that money was concerned, it seems to us that it stands precisely upon the same ground it would, had Kilgore delivered the money to some stranger, or to an express company, to transmit it to the plaintiff. It is disconnected with the illegal transaction and is not affected by it." [1]

§ 149. (IV) **Illegal transaction by partner: Rights of copartner.** — A question similar to that considered in the preceding section frequently arises in cases of illegal partnerships. As early as in 1725, in the famous case of *Everet* v. *Williams*,[2] a bill for an accounting between two gentlemen engaged as partners in the profession of highway robbery was declared scandalous and impertinent. But in *Sharp* v. *Taylor*,[3] it was held that a partner cannot escape his obligation to account for profits by showing that in realizing them a statute was violated. "The transaction alleged to be illegal," said the court,[4] "is completed and closed and will not be in any manner affected." This case has had

[1] See also Caldwell *v.* Harding, 1869, 1 Low. (U. S. C. C.) 326, 330; Fed. Cas., No. 2, 302; McMullen *v.* Hoffman, 1899, 174 U. S. 639, 660; 19 S. Ct. 839. In many of the cases in which a recovery is allowed, the defendant was not employed in making the illegal contract but was an agent for the collection of proceeds only.

[2] Commonly called the Highwayman's Case, Exch., 1725, 9 Law Quart. Rev. 197; 2 Evans' Pothier on "Obligations," 3, n. 1; Lindley, "Partnership," 7th Eng. ed., 107.

[3] 1849, 2 Ph. Ch. 801, (violation of registry laws). [4] At page 818.

some following in America,[1] but it was severely criticized in the later English case of *Sykes* v. *Beadon*,[2] and its doctrine appears to be repudiated by the weight of American authority.[3] Apparently, the courts in most jurisdictions have not felt, in the cases of illegal partnerships or illegal transactions by partners, that the importance of requiring fidelity between fiduciaries is greater than that of denying relief to lawbreakers.

§ 150. (V) **Necessity of demand: Statute of limitations: Interest.** — Since the obligation in quasi contract arises as soon as the recipient of the benefit learns that he ought to make restitution (*ante*, § 32), one who refuses to perform an illegal contract but who nevertheless retains the benefit of the other

[1] See Brooks *v.* Martin, 1863, 2 Wall. (U. S.) 70, (buying soldiers' claims for land warrants: virtually overruled by McMullen *v.* Hoffman, 174 U. S. 639, 668; 19 S. Ct. 839); Mitchell *v.* Fish, 1911, Ark. ; 134 S. W. 940; Willson *v.* Owen, 1874, 30 Mich. 474, (racing); Gilliam *v.* Brown, 1870–71, 1 Morris (43 Miss.) 641; Pfeuffer *v.* Maltby, 1881, 54 Tex. 454; 38 Am. Rep. 631, (illegal traffic during war); McDonald *v.* Lund, 1896, 13 Wash. 412; 43 Pac. 348, (faro and crap games).

[2] 1879, 11 Ch. Div. 170, 196, (Association in violation of the Companies Act, 1862. "It is not sufficient," says JESSEL, M.R., "to say that the transaction is concluded as a reason for the interference of the Court. If that were the reason, it would be lending the aid of the Court to assert the rights of the parties in carrying out and completing an illegal contract. . . . It is no part of the duty of a Court of Justice to aid either in carrying out an illegal contract, or in dividing the proceeds arising from an illegal contract, between the parties to that illegal contract.").

[3] Bartle *v.* Nutt, 1830, 4 Pet. (U. S.) 184, (defrauding government in building contract); Chateau *v.* Singla, 1896, 114 Cal. 91; 45 Pac. 1015; 33 L. R. A. 750; 55 Am. St. Rep. 63, (letting for prostitution); Craft *v.* McConoughy, 1875, 79 Ill. 346; 22 Am. Rep. 171, (combination in restraint of trade); Smith *v.* Richmond, 1902; 114 Ky. 303; 70 S. W. 846; 102 Am. St. Rep. 283, (bribery); Martin *v.* Seabaugh, 1911, 128 La. ; 54 So. 935, (partnership to conduct gambling); Jackson *v.* McLean, 1890, 100 Mo. 130; 13 S. W. 393, (construction contract); Morrison *v.* Bennett, 1898, 20 Mont. 560; 52 Pac. 553; 40 L. R. A. 158, (fake horse race); Woodworth *v.* Bennett, 1871, 43 N. Y. 273; 3 Am. Rep. 706, (illegal bidding agreement); Vandegrift *v.* Vandegrift, 1910, 226 Pa. St. 254; 75 Atl. 365, (liquor); Wiggins *v.* Bisso, 1898, 92 Tex. 219; 47 S. W. 637; 71 Am. St. Rep. 837, (combination in restraint of trade); Atwater *v.* Manville, 1900, 106 Wis. 64; 81 N. W. 985, (grain on margin). See, for additional cases, Wald's Pollock, "Contracts" (Williston's ed.), 500.

party's performance is obviously not entitled to notice or demand before suit.[1] But it has been contended that one who has not refused to perform should not be sued until he has been notified of the determination of the other party to withdraw from the illegal transaction and to have back that which he has given, or its value. "Why," says Professor Keener, "should one who has not refused to do that which the plaintiff stipulated for, be liable to an action for not doing something else which he had no reason to suppose the plaintiff desired him to do?"[2] In answer it may be pointed out that an illegal contract is not voidable merely; that one ought not to accept a benefit under it; and that having accepted a benefit under it one is under a moral duty, regardless of what he supposes to be the desire of the other party, to refuse to carry out his engagement and to tender a return of that which he has received. It has been held, accordingly, that a demand is not a prerequisite to the commencement of an action for restitution.[3] This rule works no hardship where the recipient of the benefit is aware of the illegality of the contract, or is chargeable with notice of its illegality. For example, a corporation, since it is chargeable with notice of the extent of its lawful powers, is not entitled to a demand before being sued for money paid to it under an *ultra vires* contract.[4] Where the recipient of the benefit, on the other hand, is ignorant of the unlawful character of the contract and is not chargeable with knowledge, a demand ought in fairness to be made.

Where demand is not a prerequisite to the commencement of an action for the recovery of money paid under an illegal contract, interest should be allowed from the day of the receipt of the money by the defendant (*ante*, § 34),[5] and the statute of limitations should run from that date (*ante*, § 33).

[1] See Dill *v.* Wareham, 1844, 7 Met. (Mass.) 438, (*ultra vires* contract of town).

[2] "Quasi-Contracts," p. 266.

[3] White *v.* Franklin Bank, 1839, 22 Pick. (Mass.) 181, (*ultra vires* contract of bank with depositor).

[4] See Dill *v.* Wareham, 1844, 7 Met. (Mass.) 438.

[5] But see Brennan *v.* Gallagher, 1902, 199 Ill. 207; 65 N. E. 227, (*ultra vires* contract of a building and loan association).

§ 151. (VI) **Certain contracts separately considered.** (1) **Marriage brokage contracts.** — In the early case of *Smith* v. *Bruning*,[1] the Master of the Rolls, in ordering a marriage brokage bond to be given up, decreed that the sum of fifty guineas paid to one of the defendants be refunded. And in two comparatively recent cases, one decided in England and the other in New York, it is held that money paid by a woman to the proprietor of a "matrimonial bureau" under an illegal contract to introduce men to her with a view to matrimony, may be recovered. But the two courts do not assign the same reason for their conclusion. In *Hermann* v. *Charlesworth*,[2] the English case, there is no suggestion that the parties were not *in pari delicto*, and the court rests its decision, apparently, upon the ground that the plaintiff withdrew from the transaction before its illegal purpose was accomplished. In *Duval* v. *Wellman*,[3] the New York case, on the other hand, it is declared that the plaintiff was not *in pari delicto*, — or, at least, that there was sufficient evidence to justify the jury in so finding. Said the court:

"It is true there is no evidence of actual overpersuasion or undue influence. But at most the inferences to be drawn from these facts were for the jury. The prominent fact in the case is that such a place as the defendant maintained existed in the community with its evil surroundings and immoral tendencies. What influence was exerted upon the mind of the widow by the mere fact of the existence of such a place to which resort could be had, cannot of course appear except by inference. But if the evidence was not sufficiently strong to authorize the court to hold as a question of law that the parties were not *in pari delicto* it at least presented a question of mixed fact and law for the jury."

To infer actual fraud or undue influence over a woman who desires a husband from the mere fact that she has dealt with

[1] 1700, 2 Vern. 392; also reported under the title of Goldsmith *v.* Bruning, in 1 Eq. Cas. Abr. 90.

[2] [1905] 2 K. B. 123.

[3] 1891, 124 N. Y. 156, 163; 26 N. E. 343.

the proprietor of a "matrimonal bureau" seems hardly justifiable. But it is not unreasonable that credulous and weak-minded persons should be protected by law from the tempting representations of marriage brokers, and there is reason to believe that such is one of the purposes of the doctrine which makes marriage brokage contracts illegal. "Every temptation," said Story,[1] in expounding the doctrine, "to the exercise of an undue influence or a seductive interest in procuring a marriage, should be suppressed; since there is infinite danger that it may, under the disguise of friendship, confidence, flattery, or falsehood, accomplish the ruin of the hopes and fortunes of most deserving persons, especially of females."[2]

If, then, the purpose, or one of the chief purposes, of the prohibition is the protection of a class of persons represented by the plaintiff from a class represented by the defendant, it follows that the plaintiff is not *in pari delicto*, even though no actual fraud or constraint is established. That this is the underlying reason for the decision in *Duval* v. *Wellman* is suggested in one paragraph of the opinion, as follows:[3]

"But where a party carries on a business of promoting marriage as the defendant appears to have done, it is plain to be seen that the natural tendency of such a business is immoral and it would be so clearly the policy of the law to suppress it and public interest would be so greatly promoted by its suppression, that there would be no hesitation upon the part of the courts to aid the party who had patronized such a business by relieving him or her from all contracts made, and grant restitution of any money paid or property transferred."

It should be noted, in conclusion, that the theory of *Duval* v. *Wellman* might be held to have no application if the defendant were not the proprietor of a "matrimonal bureau,"[4] or a pro-

[1] "Equity Jurisprudence," § 261.

[2] See also Drury *v.* Hooke, 1686, 1 Vern. 412; Crawford *v.* Russell, 1872, 62 Barb. (N. Y. Sup. Ct.) 92.

[3] At page 162.

[4] But see, *contra*, Wenninger *v.* Mitchell, 1909, 139 Mo. App. 420; 122 S. W. 1130.

fessional marriage broker, while the grounds adopted in *Hermann* v. *Charlesworth* would support a decision against one who did not hold himself out as a promoter of marriages, as well as against a professional broker.

§ 152. (2) **Wagering contracts.**—In general, wagers were not regarded by the English courts as illegal or unenforceable at common law.[1] Some American courts have taken the same view.[2] As a result, however, of the steady growth of public sentiment against gambling, wagers are now void by statute in England,[3] and illegal, either by statute or judicial decision, in most American States.[4] In many jurisdictions the statute permits the recovery of money from the stakeholder [5] or the winner;[6] and even in the absence of a statute it is generally

[1] Good *v.* Elliot, 1790, 3 Term R. 693.

[2] Johnson *v.* Fall, 1856, 6 Cal. 359; 65 Am. Dec. 518; Dewees *v.* Miller, 1851, 5 Harring. (Del.) 347; Beadles *v.* Bless, 1862, 27 Ill. 320; 81 Am. Dec. 231; Flagg *v.* Baldwin, 1884, 38 N. J. Eq. 219, 223; 48 Am. Rep. 308; Campbell *v.* Richardson, 1813, 10 Johns. (N. Y.) 406; Harris *v.* White, 1880, 81 N. Y. 532, 544; McElroy *v.* Carmichael, 1851, 6 Tex. 454.

[3] Gaming Act, 1845, s. 18 (8 & 9 Vict. c. 109); Gaming Act, 1892 (55 Vict. c. 9).

[4] Eldred *v.* Malloy, 1874, 2 Colo. 320; 25 Am. Rep. 752, (decision); Wheeler *v.* Spencer, 1842, 15 Conn. 28, (statute); Cleveland *v.* Wolff, 1871, 7 Kan. 184, (decision); Stacy *v.* Foss, 1841, 19 Me. 335; 36 Am. Dec. 755, (decision); Love *v.* Harvey, 1873, 114 Mass. 80, (decision); Wilkinson *v.* Tousley, 1871, 16 Minn. 299; 10 Am. Rep. 139, (decision); Perkins *v.* Eaton, 1825, 3 N. H. 152, (decision); Bernard *v.* Taylor, 1893, 23 Or. 416; 31 Pac. 968; 18 L. R. A. 859; 37 Am. St. Rep. 693, (decision and statute); Edgell *v.* McLaughlin, 1841, 6 Whar. (Pa.) 176; 36 Am. Dec. 214, (decision); Flagg *v.* Gilpin, 1890, 17 R. I. 10; 19 Atl. 1084, (decision); Collamer *v.* Day, 1829, 2 Vt. 144, (decision and statute).

[5] Hutchings & Co. *v.* Stilwell, 1857, 18 B. Mon. (57 Ky.) 776; Hensler *v.* Jennings, 1898, 62 N. J. L. 209; 41 Atl. 918; Van Pelt *v.* Schauble, 1903, 68 N. J. L. 638, 54 Atl. 437; French *v.* Matteson, 1901, 69 N. Y. Supp. 869; 34 Misc. Rep. 425; Simmons *v.* Bradley, 1871, 27 Wis. 689.

[6] Quillian *v.* Johnson, 1905, 122 Ga. 49; 49 S. E. 801; Desgain *v.* Wessner, 1903, 161 Ind. 205; 67 N. E. 991; Grace *v.* McElroy, 1861, 1 Allen (Mass.) 563; Cofer *v.* Riseling, 1900, 153 Mo. 633; 55 S. W. 235; Watts *v.* Lynch, 1886, 64 N. H. 96; 5 Atl. 458; Meech *v.* Stoner, 1859, 19 N. Y. 26; Mitchell *v.* Orr, 1901, 107 Tenn. 534; 64 S. W. 476.

held that so long as the money remains in the hands of the stakeholder and the unlawful transaction is therefore not consummated, the door of repentance is open:

Stacy v. *Foss*, 1841, 19 Me. 335; 36 Am. Dec. 755: Assumpsit to recover money deposited with the defendant as stakeholder of a wager on a horse trot. WESTON, C.J. (p. 337): "When the money has once been paid over to the winner, unless where made recoverable by statute, the parties being clearly *in pari delicto*, no action can be maintained to recover it back. But where the money has not been paid over by the stakeholder, although it has been lost by the happening of the event, it has been held that upon notice and demand, the stakeholder is liable to the loser for the amount by him deposited. . . . It best comports with public policy, to arrest the illegal proceeding before it is consummated." [1]

When the parties are not *in pari delicto*, as in the case of a wager with a swindler who wins by trick or fraud, since the contract is not *malum in se*, the victim may recover his stake even after payment to the winner.[2]

[1] Hampden *v.* Walsh, 1876, 1 Q. B. D. 189; Burge *v.* Ashley & Smith, [1900] 1 Q. B. 744; Hale *v.* Sherwood, 1873, 40 Conn. 332; 16 Am. Rep. 37; Taylor *v.* Moore, 1898, 20 Ind. App. 654; 50 N. E. 770; Gilmore *v.* Woodcock, 1879, 69 Me. 118; 31 Am. Rep. 255; Morgan *v.* Beaumont, 1876, 121 Mass. 7; Whitwell *v.* Carter, 1856, 4 Mich. 329; Pabst Brewing Co. *v.* Liston, 1900, 80 Minn. 473; 83 N. W. 448; 81 Am. St. Rep. 275; Wood *v.* Wood, 1819, 3 Murph. (N. C.) 172; Dauler *v.* Hartley, 1896, 178 Pa. St. 23; 35 Atl. 857; McGrath *v.* Kennedy, 1886, 15 R. I. 209; 2 Atl. 438; Guthman *v.* Parker, 1859, 3 Head (Tenn.) 233; Lewy *v.* Crawford, 1893, 5 Tex. Civ. App. 293; 23 S. W. 1041; Tarleton *v.* Baker, 1843, 18 Vt. 9; 44 Am. Dec. 358. See, *contra*, Dooley *v.* Jackson, 1904, 104 Mo. App. 21, 78 S. W. 330; Yates *v.* Foot, 1814, 12 Johns. (N. Y.) 1; Johnston *v.* Russell, 1869, 37 Cal. 670; holding that one who bets on an election and does not resile until the result of the election is known, cannot recover from the stakeholder.

[2] Lockman *v.* Cobb, 1905, 77 Ark. 279; 91 S. W. 546; Auxer *v.* Llewellyn, 1908, 142 Ill. App. 265; Webb *v.* Fulchire, 1843, 3 Ired. (25 N. C.) 485; 40 Am. Dec. 419; Falkenburg *v.* Allen, 1907, 18 Okla. 210; 90 Pac. 415; 10 L. R. A. (N. S.) 494. But see Babcock *v.* Thompson, 1826, 2 Pick. (Mass.) 446; 15 Am. Dec. 235.

Payment over to the winner after notice or demand by the loser is not a defense in an action against the stakeholder,[1] and it seems that in such a case the money may be recovered from the winner.[2] Certainly, the winner is liable if, when he receives the money, he is aware that the stakeholder has been notified not to pay it over, or has himself received notice not to take it.[3] It has been held that the right to recove from the stakeholder will not be defeated by the fact that the demand on the stakeholder covered the whole amount in his hands, and was based upon the ground that the plaintiff had won the bet.[4] But such a demand is obviously inc nsistent with the theory of repudiation and does not fairly notify the stakeholder that the party has withdrawn from the transaction. That the demand must be for the amount paid to the stakeholder by the plaintiff alone would seem to be the better rule.[5]

§ 153. (3) **Contracts made or to be performed on Sunday.** — The legality of contracts made or to be performed on Sunday is a question governed, in most jurisdictions, by statute. The enactments vary widely, as do their interpretations by the courts. The discussion of either is without the proper limits of this treatise. It should be noted, however, that a contract illegal because *entered into* on Sunday is peculiar in that the violation of law is consummated the moment the contract is made. It follows that there should be no *locus pœnitentiæ* for the parties

[1] Wise *v.* Rose, 1895, 110 Cal. 159; 42 Pac. 569; McLennan *v.* Whiddon, 1904, 120 Ga. 666; 48 S. E. 201; Alexander *v.* Mount, 1858, 10 Ind. 161; Adkins *v.* Flemming, 1870, 29 Ia. 122; Turner *v.* Thompson, 1900, 107 Ky. 647; 55 S. W. 210; McDonough *v.* Webster, 1878, 68 Me. 530; Pabst Brewing Co. *v.* Liston, 1900, 80 Minn. 473; 83 N. W. 448; 81 Am. St. Rep. 275. See Johnston *v.* Russell, 1869, 37 Cal. 670, 676.

[2] McKee *v.* Manice, 1853, 11 Cush. (Mass.) 357; West *v.* Holmes, 1854, 26 Vt. 530.

[3] Love *v.* Harvey, 1873, 114 Mass. 80; Guthman *v.* Parker, 1859, 3 Head (Tenn.) 233.

[4] Hastelow *v.* Jackson, 1828, 8 Barn. & Cress. 221; Hale *v.* Sherwood, 1873, 40 Conn. 332; 16 Am. Rep. 37, (with a vigorous dissenting opinion).

[5] Maher *v.* Van Horn, 1900, 15 Colo. App. 14; 60 Pac. 949; Okerson *v.* Crittenden, 1883, 62 Ia. 297; 17 N. W. 528.

to such a contract.[1] There are cases to the contrary,[2] which rest upon the misapprehension that the *locus pœnitentiæ* continues until the contract is *wholly executed* (see *ante*, § 144). Indeed there are cases which permit the recovery of money paid or property delivered under a Sunday contract which has been fully performed on both sides;[3] but this is clearly contrary to the weight of authority.[4] On the other hand, in the case of a contract which, although made on a secular day, is illegal because to be performed in whole or in part on Sunday the right to resile and recover the benefit of part performance continues until by performance on Sunday the violation of law is accomplished.[5]

One who is induced by fraudulent representations to enter into a contract which is in violation of a Sunday law should not be regarded as *in pari delicto* and consequently should be allowed to recover a benefit conferred in performance of the contract. It has been so held;[6] but there are cases denying relief.[7]

[1] See Cranson *v.* Goss, 1871, 107 Mass. 439, 441; 9 Am. Rep. 45, where GRAY, J., said: "If a chattel has been sold and delivered on the Lord's day without payment of the price, the seller cannot recover either the price or the value; not the price agreed on that day, because the agreement is illegal; not the value, because, whether the property is deemed to have passed to the defendant, or to be held by him without right, there is no ground upon which a promise to pay for it can be implied." Also Troewert *v.* Decker, 1881, 51 Wis. 46; 8 N. W. 26; 37 Am. Rep. 808.

[2] Brown *v.* Timmany, 1851, 20 Ohio 81. And see Myers *v.* Meinrath, 1869, 101 Mass. 366, 369; 3 Am. Rep. 368.

[3] Tucker *v.* Mowery, 1864, 12 Mich. 378; Brazee *v.* Bryant, 1883, 50 Mich. 136; 15 N. W. 49.

[4] Thornhill *v.* O'Rear, 1896, 108 Ala. 299; 19 So. 382; 31 L. R. A. 793, (but see Dodson *v.* Harris, 1846, 10 Ala. 566); Kelley *v.* Cosgrove, 1891, 83 Ia. 229; 48 N. W. 979; Myers *v.* Meinrath, 1869, 101 Mass. 366; 3 Am. Rep. 368; Foster *v.* Wooten, 1890, 67 Miss. 540; 7 So. 501; Thompson *v.* Williams, 1878, 58 N. H. 248; Chestnut *v.* Harbaugh, 1875, 78 Pa. St. 473; Cohn *v.* Heimbauch, 1893, 86 Wis. 176; 56 N. W. 638.

[5] See Stewart *v.* Thayer, 1898, 170 Mass. 560; 49 N. E. 1020.

[6] Adams *v.* Gay, 1847, 19 Vt. 358.

[7] Plaisted *v.* Palmer, 1874, 63 Me. 576. And see Robeson *v.* French, 1846, 12 Met. (Mass.) 24; 45 Am. Dec. 236; Northrup *v.* Foot, 1835, 14 Wend. (N. Y.) 248.

CHAPTER IX

MISRELIANCE ON ILLEGAL CONTRACT (*continued*): ULTRA VIRES CONTRACTS OF CORPORATIONS

§ 154. Two views of *ultra vires* contracts.
§ 155. Difference in effect between two doctrines.
§ 156. The illegality of *ultra vires* contracts peculiar: Do general rules apply?
§ 157. The right to restitution:
(1) In England.
§ 158. Same: The English doctrine as to money borrowed.
§ 159. (2) In the United States Supreme Court.
§ 160. (3) In the State courts.
§ 161. Enforcement of restitution against policy: *Ultra vires* contracts of municipal corporations.

§ 154. **Two views of ultra vires contracts.** — It is now the favored doctrine that a corporation's capacity to contract is not limited by its charter but is coextensive with that of a natural person.[1] However, in England, in the United States Supreme Court, and in some of the States, it is still insisted that a corporation is legally incompetent to make any contract not reasonably incidental to the objects of its incorporation.[2] And it is every-

[1] Professor Harriman, 14 Harv. Law Rev. 332, 335; Machen, "Corporations," §§ 1019, 1020; Morawetz, "Corporations," § 648; George Wharton Pepper, 9 Harv. Law. Rev. 255; Wald's Pollock, "Contracts" (Williston's ed.), 139, note 16.

[2] Ashbury Ry., etc., Co. *v.* Riche, 1875, L. R. 7 H. L. 653; Central Transportation Co. *v.* Pullman's, etc., Co., 1891, 139 U. S. 24; 11 S. Ct. 478; Chewacla Lime Works *v.* Dismukes, 1889, 87 Ala. 344; 6 So. 122; 5 L. R. A. 100; National Home Bldg. Assn. *v.* Home Sav. Bank, 1899, 181 Ill. 35; 54 N. E. 619; 64 L. R. A. 399; 72 Am. St. Rep. 245; Brunswick Gas Light Co. *v.* United Gas Co., 1893, 85 Me. 532; 27 Atl. 525; 35 Am. St. Rep. 385; Western Maryland R. Co. *v.* Blue Ridge Hotel Co. 1905, 102 Md. 307; 62 Atl. 351; 2 L. R. A. (N. S.) 887; 11 Am. St. Rep. 362; Buckeye Marble Co. *v.* Harvey, 1892, 92 Tenn. 115; 20 S. W. 427; 18 L. R. A. 252; 36 Am. St. Rep. 71; Metropolitan Stock Exch. *v.* Lyndonville Nat. Bank, 1904, 76 Vt. 303; 57 Atl. 101.

where conceded that, whether competent or not, a corporation is, as a matter of public policy, impliedly prohibited from making such a contract. It follows that where the so-called doctrine of general capacity obtains, the only objection that may be urged against the enforcement of an *ultra vires* contract is that of illegality; while in jurisdictions accepting the so-called doctrine of special capacity, an *ultra vires* contract may be attacked both as unwarranted by law and as void for want of capacity to contract.

§ 155. **Difference in effect between the two doctrines.** — In theory a contract void for want of contractual capacity is a legal nullity. It follows that full performance by one party will not make the contract enforceable against the other. A prohibited contract, on the other hand, may not be totally inoperative. In each case the effect of the prohibition is a question of construction. And in cases of *ultra vires* contracts of corporations it has generally been held that full performance by one party will make the contract enforceable against the other, the theory being that the policy of forbidding contracts not reasonably incidental to the objects of incorporation is outweighed by the more important policy of preventing one who has enjoyed the benefit of a contract not *malum in se* from escaping its obligation.

As a result of the distinction just pointed out, the doctrine of special capacity necessitates a more frequent resort to the quasi contractual theory of obligation than does the doctrine of general capacity. Under the former doctrine, whether one has enjoyed the benefit of full or of partial performance of an *ultra vires* contract by the other party, his only obligation is to make restitution. Under the latter, if one has enjoyed the benefit of full performance by the other party he may be held contractually, and it is only where there has been partial performance on one side and full performance on neither that it is necessary to resort to quasi contract.

§ 156. **The illegality of ultra vires contracts peculiar: Do general rules apply?** — It must not be forgotten that, whichever doctrine of capacity obtains, the making of an *ultra vires* con-

tract is a violation of statutory prohibition, either express or implied, and that consequently one who seeks a remedy in quasi contract is always, in a sense, in the position of a party to an unlawful transaction. Is the right to recover in quasi contract, then, determined by the same rules as govern quasi contractual rights arising from other illegal contracts? In some cases the rule of *par delictum* has been recognized and the right to recover has been based ostensibly upon the conclusion that the plaintiff was not *in pari delicto* with the defendant corporation.[1] But in one important case a recovery was allowed although the court expressly declared that the plaintiff was as much in fault as the defendant.[2] And in a large number of cases — both of express and implied prohibitions — there is no reference whatever either to *par delictum* or to *locus pœnitentiæ*.[3] This indicates that the illegality of *ultra vires* contracts is generally regarded as of a peculiar and comparatively mild sort, not calling for the application of the rule of public policy which ordinarily prevents a quasi contractual recovery. The only reason that has been adduced in support of this view is that *ultra vires* contracts are contrary to public policy, not be-

[1] White *v.* Franklin Bank, 1839, 22 Pick. (Mass.) 181. See also Parkersburgh *v.* Brown, 1882, 106 U. S. 487; 1 S. Ct. 442, (implied prohibition); Morville *v.* Am. Tract Society, 1877, 123 Mass. 129; 25 Am. Rep. 40, (implied prohibition).

[2] Pullman's Car Co. *v.* Central Transp. Co., 1897, 171 U. S. 138; 18 S. Ct. 808, (express prohibition). And see Jenson *v.* Toltec Ranch Co., 1909, 174 Fed. 86; 98 C. C. A. 60, (SANBORN, Circuit Judge, at p. 92: "It is no defense, to a suit to enforce a contract that has been performed by the promisee to repay money loaned to or paid for another and to foreclose a mortgage to secure that repayment, that the lender or the payor knew that the borrower intended to use, or was using, the money for an illegal purpose, or a purpose beyond its corporate powers, where the lender or payor did not combine or conspire with the borrower to induce such a use and did not share in the benefits thereof.").

[3] See Louisiana *v.* Wood, 1880, 102 U. S. 294, (express prohibition); Logan Co. Nat. Bank *v.* Townsend, 1891, 139 U. S. 67; 11 S. Ct. 496, (implied prohibition); New Castle, etc., R. Co. *v.* Simpson, 1884, 21 Fed. 533, (express prohibition); Emmerling *v.* First Nat. Bank, 1889, 97 Fed. 739; 38 C. C. A. 399, (implied prohibition); Richmond Guano Co. *v.* Farmers' Cotton, etc., Co., 1903, 126 Fed. 712; 61 C. C. A. 630, (implied prohibition).

cause of the nature of their subject matter, but because of the corporate character of one of the parties.[1] This has been thought a sufficient reason, however, by eminent authority:

MACHEN, "Corporations," § 1020: "But although the making of *ultra vires* contracts by a corporation is undoubtedly prohibited by law, yet the illegality is of a very peculiar kind, and hence one should not hastily conclude that such contracts must necessarily be governed by the same rules as other illegal contracts — contracts, for example, that are *mala in se*. The illegality of *ultra vires* contracts depends upon no policy of the law as to the subject matter to which they relate, but solely upon the fact that they are not within the company's powers as defined in its act of incorporation or incorporation paper. To apply to them precisely the same rules that have been deemed necessary in order to discourage illegal contracts in general and to relieve the courts from the disagreeable task of nicely adjusting equities between various parties all of whom have been acting contrary to good morals or to the policy of the law, would be both illogical and unjust. If, therefore, *ultra vires* contracts be conceded to be illegal, they should be governed by rules which as applied to this peculiar kind of illegality are best adapted to promote the policy of the law and the ends of justice."

Whatever view may be taken as to the effect of the ordinary implied prohibition, it seems clear that the legislature in expressly prohibiting certain contracts may so plainly indicate an intention to make a violation of the prohibition a serious offense against public policy as to call for the application of the rules governing other illegal contracts.[2]

[1] "Although the unauthorized contract may be neither *malum in se*, nor *malum prohibitum*, but, on the contrary, may be for some benevolent or worthy object, as to build an alsmhouse or a college, or to purchase and distribute tracts or books of instruction, yet, if it is a violation of public policy for corporations to exercise powers which have never been granted to them, such contracts, notwithstanding their praiseworthy nature, are illegal and void." — SHELDON, J., in Bissel *v.* R. Co., 1860, 22 N. Y. 258, 285. See also Peoria Star Co. *v.* Cutright, 1904, 115 Ill. App. 492, 495; Franklin Co. *v.* Savings Bank, 1877, 68 Me. 43, 48.

[2] See Machen, "Corporations," § 1065.

§ 157. **The right to restitution:** (1) **In England.** — The English courts are said to carry out the theory of special capacity with "severe consistency." [1] Neither the authorization of an *ultra vires* contract by all the stockholders,[2] nor their unanimous consent to the entry of a judgment against the corporation on such a contract, will result in obligation.[3] The decisions waver slightly, however, upon the subject of the quasi contractual obligation to restore benefits received under *ultra vires* contracts. In a case holding that a joint stock company organized for the purpose of life assurance, which issues policies on marine assurance without complying with the statutory requirements for enlarging the scope of its business, is obliged to return the premiums received on such *ultra vires* policies, the principle was recognized:

Re Phœnix Life Assurance Co., 1862, 2 Johns. &. Hem. 411: Vice Chancellor WOOD, (p. 448): "The Directors, it is true, had no power to issue marine policies, but they had power to receive money, and apply it for the benefit of the Company. It is proved that they did so receive and apply these premiums, and the amount might have been recovered, even at law, as money had and received."

But in the most conspicuous class of cases — that of money borrowed *ultra vires* — the application of the principle has been restricted to very narrow limits.

§ 158. **Same: The English doctrine as to money borrowed ultra vires.** — It appears to be settled that money borrowed *ultra vires* is not recoverable at law by the lender,[4] unless it remains unused in the hands of the corporation.[5] In equity, however, it is held that money so borrowed must be refunded

[1] Machen, "Corporations," § 1028.

[2] East Anglian R. Co. *v.* Eastern Counties R. Co., 1851, 11 C. B. 775.

[3] Great North-West, etc., R. Co. *v.* Charlebois, [1899] A. C. 114.

[4] See Chambers *v.* R. Co., 1864, 5 Barn. & Cress. 588; *In re* National, etc., Building Society, 1869, L. R. 5 Ch. 309; *In re* Victoria, etc., Society, 1870, L. R. 9 Eq. 605.

[5] See *In re* Wrexham, etc., R. Co., [1899] 1 Ch. 440, 457.

to the extent that it has been used in the discharge of legitimate debts of the corporation.[1] This rule was based originally upon the doctrine of subrogation and seems to have been suggested by the analogy to cases of money borrowed by infants or married women and expended for necessaries,[2] but in the later cases it is said to rest upon the theory that if money borrowed is so expended as not to increase the liabilities of the corporation there is in substance no borrowing at all and the transaction should not be regarded, in equity, as *ultra vires:*

Blackburn Building Society v. *Cunliffe*, 1882, 22 Ch. Div. 61: Lord SELBORNE, L.J. (p. 71): "The test is: has the transaction really added to the liabilities of the company? If the argument of the company's liabilities remains in substance unchanged, but there is, merely for the convenience of payment, a change of the creditor, there is no substantial borrowing in the result, so far as related to the position of the company."

The soundness of this reasoning may be questioned. Where a corporation is given power to borrow, but is forbidden to borrow after a prescribed limit of indebtedness is reached, it is clear enough that the purpose of the prohibition is merely to keep the corporation within the limit fixed, and therefore that money borrowed after the limit is reached but immediately applied in payment of a preëxisting debt is in reality not borrowed *ultra vires*.[3] But where a corporation is given no power whatever to borrow it is going rather far to conclude that money borrowed and applied in discharge of debts arising either before or after such borrowing, is in substance not borrowed at all.[4] It would be simpler and more equitable, it is submitted, to allow

[1] Troup's Case, 1860, 29 Beav. 353; *In re* Cork, etc., R. Co., 1869, L. R. 4 Ch. 748; Blackburn Building Society *v.* Cunliffe, 1882, 22 Ch. Div. 61; Baroness Wenlock *v.* River Dee Co., 1887, 19 Q. B. D. 155.

[2] See *In re* National, etc., Building Society, 1869, L. R. 5 Ch. 309; Baroness Wenlock *v.* River Dee Co., 1887, 19 Q. B. D. 155, 165.

[3] See *In re* Wrexham, etc., R. Co., [1899] 1 Ch. 440, 457.

[4] In Baroness Wenlock *v.* River Dee Co., 1887, 19 Q. B. D. 155, it was held to be immaterial whether the money was applied in discharge of debts arising before or after the borrowing.

a recovery in quasi contract whenever it appears that the money loaned to a corporation was loaned in reliance upon the validity of the company's contract and either remains in the company's hands or has been used in the legitimate business of the company, whether in the payment of debts, the purchase of property, or otherwise. The language of the courts, in a few instances, seems broad enough to support such a rule:

Troup's Case, 1860, 29 Beav. 353: A claim by the secretary of an electrical telegraph company against the company, under a winding-up order, for money borrowed by him for the company and applied for its benefit. The claim was opposed on the ground that the company had no power to borrow money.[1] It appeared that the money had been applied, in the main, to the satisfaction of a debt due from a contractor to a bank, against which debt the directors of the company had agreed to indemnify the contractor in part payment for certain works and materials prepared by the contractor for the construction of the company's telegraph line. The Master of the Rolls [Sir JOHN ROMILLY] (p. 356): "The company thereby obtained the stock and materials in this manner and have sold them for about the price they gave for them (the price, however, is immaterial), and the proceeds of this sale have been divided among the shareholders, or if not so divided, have gone in diminution of the calls upon the shareholders by being applied in making good the claims upon the company. . . . The principle is this: — that where the Directors of a company have no power to borrow money, the repayment of money borrowed cannot be enforced by the lender against the company; yet, if the money has been *bona fide* applied to the purposes of the company, the *bona fide* lender is entitled to payment as against the company."

But, on the other hand, it has been explicitly held that where money is borrowed *ultra vires* by a benefit building society and advanced to its members upon mortgage security (such loans to members being *intra vires*), the society is not obliged, even in

[1] In this case, as in some others cited in this section, it is not entirely clear whether the contract was beyond the powers of the corporation or merely beyond the powers of the directors.

equity, to make restitution to the lender.[1] And in other cases there are strong *dicta* to the same effect.[2]

The reason usually given for denying a recovery where the money borrowed is expended in the legitimate business of the corporation, but not in the payment of its debts, is that to permit a recovery would be in effect to enforce the *ultra vires* contract of loan:

In re Wrexham, etc., R. Co., [1899] 1 Ch. 440: VAUGHAN WILLIAMS, L.J. (p. 457): "But, if the company, instead of either refraining from adopting the loan, or applying it in such a manner as that their total indebtedness shall remain unchanged, apply it, say, to the purchase of new property, the company cannot, after so doing, be sued in any form for a return of the money, since the money had been dealt with under the contract of loan, and to allow the company to repay it would simply be to allow them to carry through an *ultra vires* transaction."

In reply to this argument it might be urged that to allow money loaned upon an *ultra vires* contract to be recovered before the maturity of the loan is quite different from allowing the parties "to carry through an *ultra vires* transaction." But granting the cogency of the argument, what actual harm would result if the lender were allowed a quasi contractual recovery? At the worst, such a rule might offer some encouragement to the making of *ultra vires* contracts of loan. On the other hand, and of vastly greater importance, it would afford adequate protection to the innocent lender — protection entirely consistent, moreover, with the English theory of corporate capacity.

§ 159. (2) **In the United States Supreme Court.** — The Federal courts of the United States have not been as consistent as the English courts in their attitude toward *ultra vires* contracts.[3] The Supreme Court, however, has steadfastly professed adherence to the doctrine of special capacity, and in the face of a swelling current of adverse authority has insisted that contracts

[1] *In re* National, etc., Building Society, 1869, L. R. 5 Ch. 309.
[2] See *In re* Wrexham, etc., R. Co., [1899] 1 Ch. 440, 457.
[3] See Machen, "Corporations," §§ 1032–47.

ultra vires are absolutely void, and therefore that even though performed on one side they are unenforceable. In the leading case of *Central Transp. Co.* v *Pullman's, etc., Co.*,[1] Mr. Justice GRAY expounded this view in language so forceful and so frequently quoted that it has become familiar:

"A contract of a corporation, which is *ultra vires*, in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void, and of no legal effect. The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it."

In the same case it was pointed out[2] that while there is no remedy for breach of the contract, the receipt of property delivered or money paid upon the faith of the contract gives rise to an obligation to make restitution either *in specie* or in value:

"A contract *ultra vires* being unlawful and void, not because it is in itself immoral, but because the corporation, by the law of its creation, is incapable of making it, the courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as could be done consistently with adherence to law, by permitting property or money, parted with on faith of the unlawful contract, to be recovered back, or compensation to be made for it."

In a later suit arising from the same transaction as *Central Transp. Co.* v. *Pullman's Co.*,[3] the obligation to make restitution was actually enforced, and in a number of other cases

[1] 1897, 139 U. S. 24, 59; 11 S. Ct. 478.
[2] At page 60.
[3] Pullman's Palace Car Co. *v.* Central Transp. Co., 1897, 171 U. S. 138; 18 S. Ct. 808.

in the Federal courts the principle has been recognized and applied.[1]

Cases arising from *ultra vires* borrowing appear to be less frequent — certainly they are less conspicuous — in America than in England. This is probably due in part to the fact that there has been little disposition in this country to adopt the restrictions which the English courts have placed upon the lender's right to recover (*ante*, § 158). In a comparatively recent case, *Aldrich* v. *Chemical National Bank*,[2] for example, the Supreme Court of the United States concludes a discussion of the question as follows:

"Without further citation of cases we adjudge, both upon principle and authority, that as the money of the Chemical Bank was obtained under a loan negotiated by the vice president of the Fidelity Bank, who assumed to represent it in the transaction, and as the Fidelity Bank used the money so obtained in its banking business and for its own benefit, the latter bank having enjoyed the fruits of the transaction cannot avoid accountability to the New York bank, even if it were true as contended that the Fidelity Bank could not consistently with the law of its creation have itself borrowed the money."[3]

It is true that in this case the money borrowed *ultra vires* was applied in payment of valid debts of the bank, and therefore that the lender would have been protected under the doctrine of the English courts of equity. But it is significant that the Supreme Court makes no reference to the English doctrine, and

[1] Logan Co. Nat. Bank *v.* Townsend, 1891, 139 U. S. 67; 11 S. Ct. 496; Aldrich *v.* Chemical Nat. Bank, 1900, 176 U. S. 618; 20 S. Ct. 498; Citizens Nat. Bank *v.* Appleton, 1910, 216 U. S. 196; 30 S. Ct. 364, (*aff.* Appleton *v.* Citizens Bank, 1908, 190 N. Y. 417; 83 N. E. 470); Manville *v.* Belden Mining Co., 1883, 17 Fed. 425 (C. C., Colo.); New Castle, etc., R. Co. *v.* Simpson, 1884, 21 Fed. 533 (C. C., Pa.); Emmerling *v.* First Nat. Bank, 97 Fed. 739; 38 C. C. A. 399; Richmond Guano Co. *v.* Farmers' Cotton, etc., Co., 1903, 126 Fed. 712; 61 C. C. A. 630. *Cf.* Am. Nat. Bank *v.* Nat. Wall Paper Co., 1896, 77 Fed. 85; 23 C. C. A. 33; 40 U. S. App. 646.

[2] 1900, 176 U. S. 618, 635; 20 S. Ct. 498.

[3] And see Sioux City Terminal, etc., Co. *v.* Trust Co., 1897, 82 Fed. 124; 27 C. C. A. 73; 49 U. S. App. 523.

repeatedly emphasizes the use of the money for the bank's benefit, not merely the payment of its debts, as the basis of obligation.

The case of *Logan County Nat. Bank* v. *Townsend*[1] has attracted some attention and has been thought inconsistent with other decisions of the Supreme Court. In an action to recover damages for breach of contract it appeared that the bank bought certain municipal bonds from Townsend for a sum in cash, which was paid, and agreed to replace the bonds, upon demand, at the same or a less price. Subsequently Townsend demanded compliance with this agreement, but the bank refused. Said Mr. Justice HARLAN:

"If it be assumed, in accordance with the bank's contention, that it was without power to purchase these bonds, to be replaced to the plaintiff, on demand, the question would still remain, whether, notwithstanding the act of Congress defining and limiting its powers, it was exempt from liability to the plaintiff for the value of the bonds, if it refused, upon demand, to replace or surrender them at the same or a less price.

"It would seem, upon the defendant's theory of its powers, to be too clear to admit of dispute that the act of Congress does not give to a national bank an absolute right to retain bonds coming into its possession, by purchase, under a contract which it was without authority to make. True, it is not under a duty to surrender possession until reimbursed the full amount due to it: it has the right to hold the bonds as security for the return of the consideration paid for them; but when such amount is returned, or tendered back to it, and the surrender of the bonds is demanded, its authority to retain them no longer exists. And from the time of such demand and its refusal to return the bonds to the vendor or owner, it becomes liable for their value upon grounds apart from the contract under which it obtained them. . . .

". . . The bank, if liable at all, is certainly liable in this case, for the value of the bonds at the time it refused, upon demand, to restore them. It was not in default, under the alleged contract, until the plaintiff's demand for its performance;

[1] 1891, 139 U. S. 67, 74, 78; 11 S. Ct. 496.

for until then its possession of the bonds was with his consent. Until demand, the plaintiff had not manifested his will to have them restored to him. The conversion occurred when the defendant repudiated all obligation to perform the contract or denied that any such contract was ever made, and yet held on to the bonds as its property."

In its *dictum* to the effect that the bank had a lien on the bonds for the amount paid for them under the *ultra vires* contract, the case, it is submitted, goes too far. The learned court relied upon a supposed analogy to cases holding that a national bank may enforce a mortgage or deed of trust taken *ultra vires* as security for a loan,[1] but apparently overlooked this vital distinction — that whereas a mortgage or deed of trust taken *ultra vires* as security for a loan may be upheld upon the theory that it is fully executed and therefore should not be disturbed,[2] the *ultra vires* contract in the principal case was not an executed contract, but was only partly performed. Moreover, if the contract was to be upheld as executed, or so far as executed, the bank should have been adjudged the owner of the bonds and not merely the holder of a lien upon them.

In holding that upon its refusal to restore the bonds when the plaintiff tendered a return of the price the bank became liable for the difference between such price and the value of the bonds at the time of the plaintiff's demand, it is believed that the court was right. Mr. Machen contends that upon the theory of quasi contractual obligation the measure of recovery would be the difference between the price paid by the bank and the market value at the time of the purchase by the bank.[3] He overlooks, however, the fact that in refusing to return the bonds upon demand and tender of the price the bank converted them. This was recognized by the court. For this tort the plaintiff had an election of remedies (*post*, § 277). He might bring trover and recover damages, or "waive the tort" and sue in assumpsit for the value of the benefit derived by the defendant

[1] See opinion at page 76.
[2] See Machen, "Corporations," § 1036, and cases cited.
[3] See Machen, "Corporations," § 1046.

from the conversion. The action in the principal case, though in form an action for breach of contract, was regarded, apparently, as an election of assumpsit as a remedy for the tort, and it was entirely proper for the court to allow a recovery of the value of the bonds at the time of the conversion, *i.e.* at the time of the wrongful refusal to return them, minus the price which the bank paid for them and which the plaintiff offered to return.

§ 160. (3) **In the State courts.** — In the decisions of the State courts there is the utmost confusion. In a large number of States it is held that one who has enjoyed the benefit of full performance by the other party is liable in damages for a failure himself to perform.[1] Likewise, if the contract is severable, the full performance of a severable portion on one side makes the obligation of the other party as to that portion enforceable.[2] The rule is frequently attributed to the convenient principle of estoppel; sometimes it is otherwise explained. Whatever its ostensible basis, it probably rests, in reality, upon the theory than an *ultra vires* contract is not void for want of contractual capacity but is illegal as against sound public policy, and that when performed by one party public policy requires that it should be enforced rather than that the party who has enjoyed the benefit of performance should be allowed to escape its obligation. In States which have adopted this doctrine the question of quasi contractual obligation arises, or should

[1] Main *v.* Casserly, 1885, 67 Cal. 127; 7 Pac. 426; Chicago, etc., R. Co. *v.* Derkes, 1885, 103 Ind. 520; 3 N. E. 239; Dewey *v.* Toledo, etc., R. Co., 1892, 91 Mich. 351; 51 N. W. 1063; Seymour *v.* Chicago, etc., Life Co., 1893, 54 Minn. 147; 55 N. W. 907; Camden, etc., R. Co. *v.* May's Landing, etc., R. Co., 1886, 48 N. J. L. 530; 7 Atl. 523; Bath Gas Light Co. *v.* Claffy, 1896, 151 N. Y. 24; 45 N. E. 390; 36 L. R. A. 664, (and see Appleton *v.* Citizens Nat. Bank, 1908, 190 N. Y. 417; 420–421; 83 N. E. 470); Tourtelot *v.* Whithed, 1900, 9 N. D. 407; 84 N. W. 8; Wright *v.* The Pipe Line Co., 1882, 101 Pa. St. 204; 47 Am. Rep. 701; Bond *v.* Terrell, etc., Mfg. Co., 1891, 82 Tex. 309; 18 S. W. 691; McElroy *v.* Minn. Percheron Horse Co., 1897, 96 Wis. 317; 71 N. W. 652; Kanneberg *v.* Evangelical Creed Congregation, 1911, 146 Wis. 610; 131 N. W. 353.

[2] Heims Brewing Co. *v.* Flannery, 1891, 137 Ill. 309; 27 N. E. 286. But see Day *v.* Buggy Co., 1885, 57 Mich. 146; 23 N. W. 628; 58 Am. Rep. 352.

arise, only where there has been partial performance of the *ultra vires* contract on one side but full performance on neither. In such cases, a recovery in quasi contract should be permitted.[1]

In a smaller number of States the doctrine of the United States Supreme Court appears to be substantially adopted, and the full performance of the contract on one side is held not to make it enforceable.[2] In such jurisdictions it is generally held that where performance on one side, either partial or in full, results in a benefit to the other party, there is a quasi contractual obligation to make restitution:

Brunswick Gas Light Co. v. *United Gas Co.*, 1893, 85 Me. 532; 27 Atl. 525; 35 Am. St. Rep. 385: Action for breach of covenants of a lease. WALTON, J. (p. 540): "No legislative authority for making the lease was shown, and without such authority, we think the lease must be regarded as *ultra vires*, and void. . . . But it is claimed that, inasmuch as the defendant company took and held possession of the plaintiff company's works by virtue of the lease, *ultra vires* is no defense to an action to recover the agreed rent. We do not doubt that the plaintiff company is entitled to recover a reasonable rent for the time the defend-

[1] Day *v.* Buggy Co., 1885, 57 Mich. 146; 23 N. W. 628; 58 Am. Rep. 352. And see Northwestern Union Packet Co. *v.* Shaw, 1875, 37 Wis. 655; 19 Am. Rep. 781.

[2] Anglo-American Land, etc., Co. *v.* Lombard, 1904, 132 Fed. 721, 741; 68 C. C. A. 89, (Mo. law); Chewacla Lime Works *v.* Dismukes, 1889, 87 Ala. 344; 6 So. 122; 5 L. R. A. 100; First Nat. Bank *v.* Alexander, 1907, 152 Ala. 585; 44 So. 866; National Home Bldg. Assn. *v.* Home Savings Bank, 1899, 181 Ill. 35; 54 N. E. 619; 64 L. R. A. 399; 72 Am. St. Rep. 245; Davis *v.* Old Colony R. Co., 1881, 131 Mass. 258; 41 Am. Rep. 221, (*cf.* Slater Woolen Co. *v.* Lamb, 1887, 143 Mass. 420; 9 N. E. 823; Prescott Nat. Bank *v.* Butler, 1893, 157 Mass. 548; 32 N. E. 909); Norton *v.* Derby Nat. Bank, 1882, 61 N. H. 589; 60 Am. Rep. 334; Miller *v.* Insurance Co., 1893, 92 Tenn. 167; 21 S. W. 39; 20 L. R. A. 765; Metropolitan Stock Exch. *v.* Lyndonville Nat. Bank, 1904, 76 Vt. 303; 57 Atl. 101.

The Illinois courts make a distinction between acts not authorized by the charter and those within the charter powers but which are invalid through failure to comply with regulations, etc. A benefit conferred under the former cannot be recovered if the contract be *ultra vires*, while it may if it be one of the latter description. National Home, etc., Assn. *v.* Home Sav. Bank, *supra;* Wood *v.* Mystic Circle, 1904, 212 Ill. 532; 72 N. E. 783; Smith *v.* Bankers' Union of Chicago, 1908, 144 Ill. App. 384.

ant company actually occupied the works; but do not think the amount can be measured by the *ultra vires* agreement. We think that in such cases the recovery must be had upon an implied agreement to pay a reasonable rent; and that, while the *ultra vires* agreement may be used as evidence, in the nature of an admission, of what is a reasonable rent, it can not be allowed to govern or control the amount."

The Northwestern Union Packet Co. v. *Shaw*, 1875, 37 Wis. 655; 19 Am. Rep. 781: Action for breach of contract by which the plaintiff agreed to buy wheat from the defendant and paid $1000 to defendant on account thereof. Defense: that the contract was *ultra vires* and consequently void. LYON, J., after holding that the contract was *ultra vires* and that damages for its breach could not be recovered (p. 660)[1]: "But the question remains whether the plaintiff is entitled to recover the $1000. . . . The cases have been carefully examined, and we think the rule may fairly be deduced from them, that when money has been paid upon an executory agreement, which is free from moral turpitude, and is not prohibited by positive law, but which is invalid by reason of the legal incapacity of a party thereto, otherwise capable of contracting, to enter into that particular agreement, or for want of compliance with some formal requirement of the law (as that the contract shall be in writing, and the like), the money so paid may, while the agreement remains executory, be recovered back by the party paying it, in an action for money had and received. . . . A contract to buy wheat is an innocent one; no statute has prohibited it; and this particular agreement is invalid only by reason of the accident that the purchaser is a corporation instead of a natural person, and happens to lack authority to make this particular contract."[2]

[1] In later Wisconsin cases it was held that a corporation is estopped to set up the defense of *ultra vires* after receiving the benefit of full performance on the other side. See McElroy *v.* Minn. Percheron Horse Co., 1897, 96 Wis. 317; 71 N. W. 652; Bigelow *v.* Chicago, etc., R. Co., 1899, 104 Wis. 109; 80 N. W. 95.

[2] See also Brown *v.* City of Atchison, 1888, 39 Kan. 37; 17 Pac. 465; 7 Am. St. Rep. 515; Morville *v.* Amer. Tract Society, 1877, 123 Mass. 129; 25 Am. Rep. 40; Norton *v.* Derby Nat. Bank, 1882, 61 N. H. 589; 60 Am. Rep. 334; Tenn. Ice Co. *v.* Raine, 1901, 107 Tenn. 151; 64 S. W. 29.

A few cases to the contrary may be found. In at least one case the recovery in quasi contract of money paid under an *ultra vires* contract of loan has been denied upon the ground that "a recovery under a common count in this case, would be an enforcement of a void contract, as effectually as if it had been under a special count, setting forth the contract." [1] This is the same difficulty that has been felt by the English courts, and it has been considered in the discussion of the English cases (*ante*, § 158). In another case it has been held that a manufacturing corporation could not recover the value of goods delivered to a railway company in part performance of an *ultra vires* contract to take part payment in stock of the railway company, because the benefit was conferred under a mistake of law.[2] An attempt is made, in another chapter (*ante*, § 35 *et seq.*), to show that ignorance or mistake of law ought not to bar a recovery in quasi contract. Fortunately, the fallacious maxim that every one is conclusively presumed to know the law has rarely been appealed to in cases arising out of *ultra vires* contracts, and it is to be hoped that the decision above referred to will not be followed.

§ 161. **Enforcement of restitution against policy: Ultra vires contracts of municipal corporations.** — It is a generally accepted rule of policy that a municipal corporation is under no obligation to make restitution for a benefit received under an *ultra vires* contract entered into by its officers, in case such restitution would increase the burden of taxation upon the members of the municipality:

[1] *Thomas* v. *City of Richmond*, 1870, 12 Wall. (U. S.) 349: BRADLEY, J. (p. 356): "But, in the case of municipal and other public corporations, another consideration intervenes. They represent the public, and are themselves to be protected against the unauthorized acts of their officers and agents, when it

[1] Grand Lodge *v.* Waddill, 1860, 36 Ala. 313.

[2] Valley R. Co. *v.* Lake Erie Iron Co., 1888, 46 Oh. St. 44; 18 N. E. 486; 1 L. R. A. 412. And see *In re* Mutual, etc., Ins. Co., 1899 107 Ia. 143; 77 N. W. 868.

can be done without injury to third parties. This is necessary in order to guard against fraud and peculation. Persons dealing with such officers and agents are chargeable with notice of the powers which the corporation possesses, and are to be held responsible accordingly." [1]

Where, on the other hand, restitution will impose no burden upon the taxpayers, a recovery in quasi contract is permitted. Instances of this kind are found in cases of *ultra vires* contracts under which money is received by the corporation which either remains in its treasury or is expended for legitimate corporate purposes.[2] This rule is held not to apply, however, to a case in which to allow a recovery would be to accomplish the very purpose of the *ultra vires* contract, as where it is sought

[1] Also: Litchfield *v.* Ballou, 1884, 114 U. S. 190; 5 S. Ct. 820; Citizens' Bank *v.* City of Spencer, 1904, 126 Ia. 101; 101 N. W. 643, 645; South Covington Dist. *v.* Kenton Water Co., 1904, 117 Ky. 489; 25 Ky. Law Rep. 1592; 78 S. W. 420; Agawan Nat. Bank *v.* South Hadley, 1880, 128 Mass. 503; Bloomsburg Land Imp. Co. *v.* Bloomsburg, 1906, 215 Pa. St. 452; 64 Atl. 602.

See note in 4 Columbia Law Rev., 67: "Municipal corporations stand in particular need of protection against their officers. In order to afford this protection the legislature has usually defined minutely the powers of these officers and the manner in which the same shall be exercised. When any act of the corporation, through its officers, will, directly or indirectly, vary in kind or degree the burden thus authorized to be placed upon the members of the corporation, public policy demands that recovery in any form shall be denied. If, however, reparation will not in any manner affect the burden upon the taxpayers the ordinary principles of quasi-contract will be applied."

[2] Butts County *v.* Jackson Banking Co., 1908, 129 Ga. 801; 60 S. E. 149; 121 Am. St. Rep. 244; Dill *v.* Wareham, 1844, 7 Metc. (Mass.) 438; Leonard *v.* City of Canton, 1858, 6 George (35 Miss.) 189; Long *v.* Lemoyne Borough, 1908, 222 Pa. St. 311; 71 Atl. 211, (In First Nat. Bank *v.* City of New Castle, 1909, 224 Pa. St. 285; 73 Atl. 331; 132 Am. St. Rep. 779, recovery was denied where money had been advanced to the city treasurer or placed to his official account, the treasurer being at that time a defaulter: Long *v.* Lemoyne Borough, *supra*, approved.); Thomson *v.* Town of Elton, 1901, 109 Wis. 589. See also Lea *v.* Board of Com'rs, 1902, 114 Fed. 744; 52 C. C. A. 376; Municipal Security Co. *v.* Baker County, 1901, 39 Or. 396; 65 Pac. 369, (holding that where a county has received personal property or land under an *ultra vires* contract the vendor may recover in specie. Here, though, the statute of limitations had run).

to recover money paid for unauthorized municipal bonds or notes which have reached maturity.[1]

It is necessary to distinguish between a benefit for which a municipal corporation has no power to contract, and a benefit for which it has the power to contract but which is actually received under a contract *ultra vires* because of its terms, or void because of non-compliance with some formal or preliminary requirement of the law, or because of an agent's want of authority. If a benefit is one which might have been lawfully obtained, restitution in value would not impose an unauthorized burden upon the taxpayers. It has accordingly been held that a city is liable for the value of the use of a water plant the lease of which was *ultra vires* because of a condition that the lessor should construct a railroad;[2] likewise, that a city is bound to pay for the paving of streets although the contract provided for payment in bonds of the corporation the issue of which was unauthorized by law.[3] Whether or not quasi contractual obligation arises from the receipt of a benefit under a contract not in substance or in terms beyond the power of the corporation to enter into, but void because of non-compliance with a formal or preliminary requirement relating to its formation, is a question upon which the authorities differ.[4] Much

[1] Thomas *v.* City of Richmond, 1870, 12 Wall. (U. S.) 349; Litchfield *v.* Ballou, 1884, 114 U. S. 190; 5 S. Ct. 820. See Luther *v.* Wheeler, 1905, 73 S. C. 83; 52 S. E. 874; 4 L. R. A. (N. S.) 746, (criticism of this view by WOOD, J.).

[2] Higgins *v.* City of San Diego, 1897, 118 Cal. 524; 45 Pac. 824; 50 Pac. 670.

[3] Hitchcock *v.* Galveston, 1877, 96 U. S. 341, (recovery on the contract appears to have been allowed). See also Chapman *v.* County of Douglas, 1882, 107 U. S. 348; 2 S. Ct. 62; City of Kansas City *v.* Wyandotte Gas Co., 1900, 9 Kan. App. 325; 61 Pac. 317, (same as to lighting contract).

[4] *Allowing a Recovery:* Lincoln Land Co. *v.* Village of Grant, 1898, 57 Neb. 70; 77 N. W. 349, (ordinance void for defective title: approved, Nebraska Bitulithic Co. *v.* City of Omaha, 1909, 84 Neb. 375; 121 N. W. 443); Wentink *v.* Board of Freeholders, 1901, 66 N. J. L. 65; 48 Atl. 609, (failure to give notice to lower bidder in default before awarding contract to plaintiff); Ward *v.* Town of Forest Grove, 1891, 20 Or. 355; 25 Pac. 1020, (required ordinance wanting); Memphis Gaslight Co. *v.* City of Memphis, 1894, 93 Tenn. 612; 30 S. W.

depends, it is submitted, upon the purpose of the requirement and the extent to which it is disregarded. If the irregularity is such as to deprive the municipality of the protection of a safeguard against the extravagance or corruption of its officers — as a substantial failure to comply with a requirement that contracts shall be let to the lowest bidder after due publication of notice [1] — recovery should be denied. But if the irregularity is of a character that does not prejudice or endanger the interests of the municipality — as a failure to renew in writing, as required by law, a contract for gas supply [2] — recovery should be allowed.

There is likewise an apparent conflict of authority as to

25, (contract not in writing). See also Contra Costa Water Co. *v.* Breed, 1903, 139 Cal. 432; 73 Pac. 189, (opinion of McFarland, J.), For a good discussion of this distinction, see Bell *v.* Kirkland, 1907, 102 Minn. 213; 113 N. W. 271; 13 L. R. A. (N. S.) 793; 120 Am. St. Rep. 621.

Denying a Recovery: Zottman *v.* San Francisco, 1862, 20 Cal. 96; 81 Am. Dec. 96, (required publication, etc., wanting); Reichard *v.* Warren County, 1871, 31 Ia. 381, (not submitted to vote of people, as required); McCurdy *v.* County of Shiawassee, 1908, 154 Mich. 550; 118 N. W. 625, (money borrowed without authorization by vote of people); W. W. Cook & Son *v.* City of Cameron, 1910, 144 Mo. App. 137; 128 S. W. 269, (contract not reduced to writing and signed, as required by statute); McDonald *v.* Mayor, 1876, 68 N. Y. 23; 23 Am. Rep. 144, (required certificate of necessity, authorization by council, publication, etc., wanting); City of Bryan *v.* Page, 1879, 51 Tex. 532; 32 Am. Rep. 637, (required ordinance wanting); Paul *v.* City of Seattle, 1905, 40 Wash. 294; 82 Pac. 601, (required ordinance wanting). But see Moore *v.* Mayor, 1878, 73 N. Y. 238; 29 Am. Rep. 134, where it was said that a latent irregularity in an ordinance authorizing a contract will not bar a recovery. In many cases it has been held, contrary to principle, that a contract void for some irregularity or informality in its execution may be *ratified* by an acceptance of the benefit of its performance. See Abbott, "Municipal Corporations," § 279 and cases cited.

[1] McDonald *v.* Mayor, 1876, 68 N. Y. 23; 23 Am. Rep. 144, and other cases cited *supra;* City of Providence *v.* Providence Electric Light Co., 1906, 122 Ky. 237; 91 S. W. 664. But see Peterson *v.* City of Ionia, 1908, 152 Mich. 678; 116 N. W. 562; Nebraska Bitulithic Co. *v.* Omaha, 1909, 84 Neb. 375; 121 N. W. 443.

[2] Memphis Gaslight Co. *v.* City of Memphis, 1894, 93 Tenn. 612; 30 S. W. 25. But see W. W. Cook & Son *v.* City of Cameron, 1910, 144 Mo. App. 137; 128 S. W. 269.

whether there can be a recovery for benefits conferred upon a municipal corporation under a contract void for want of authority in the officers acting or professing to act for the municipality.[1] But here, again, the circumstances of the particular case are important. In general it would seem that a recovery should be allowed, but if the fact that the contract was made by one who had no authority to make it appears to have deprived the municipality of the protection of safeguards against maladministration, recovery should be denied:

Hague v. *Philadelphia*, 1865, 48 Pa. St. 527: AGNEW, J. (p. 529): "All experience teaches the utter impossibility of wholly preventing unfairness, and advantage taken in the execution of public contracts, even with the most vigilant watchfulness of the public interest. If, in addition, courts of justice hold that public servants can without authority bind the public for extras, even in proper and honest cases, they establish a principle which will greatly add to the demoralization of public contracts, and the means of robbing the treasury, whenever fraud and dishonesty can succeed in cover-

[1] *Allowing a Recovery:* Chicago *v.* McKechney, 1903, 205 Ill. 372; 68 N. E. 954; Central Paving Co. *v.* Mt. Clemens, 1906, 143 Mich. 259; 106 N. W. 888; Auerbach *v.* Salt Lake County, 1901, 23 Utah 103; 63 Pac. 907; 90 Am. St. Rep. 685, (here there had been bribery on the part of the plaintiff's assignor and the contract was *ultra vires*); Rice *v.* Ashland County, 1902, 114 Wis. 130; 89 N. W. 908.

Denying a Recovery: Fountain *v.* Sacramento, 1905, 1 Cal. App. 461; 82 Pac. 637; Shaw *v.* City and County of San Francisco, 1910, 13 Cal. App. 547; 110 Pac. 149; Otis *v.* Inhabitants of Stockton, 1884, 76 Me. 506; Baldwin *v.* Inhabitants of Prentiss, 1909, 105 Me. 469; 74 Atl. 1038; Bartlett *v.* Lowell, 1909, 201 Mass. 151; 87 N. E. 195; Groton Bridge, etc., Co. *v.* Board of Suprs., 1902, 80 Miss. 214; 31 So. 711; Burgin *v.* Smith, 1909, 151 N. C. 561; 66 S. E. 607; Hague *v.* Philadelphia, 1865, 48 Pa. St. 527. And see Floyd County *v.* Allen, 1910, 137 Ky. 575; 126 S. W. 124; 27 L. R. A. (N. S.) 1125; Floyd County *v.* Owego Bridge Co., 1911, 143 Ky. 693; 137 S. W. 237, allowing the plaintiff to remove materials furnished.

In Ohio, the legislature, in prescribing how and by whom municipal contracts should be made, enacted that every "contract, agreement, or obligation" made contrary to the provisions of the act should be void as against the corporation, and it was held that quasi contractual obligations were included in the prohibition. City of Wellston *v.* Morgan, 1901, 65 Ohio St. 219; 62 N. E. 127.

ing up the wrong. Now, more than ever, do we need a rigid enforcement of public contracts, and a stricter moral discipline, to defeat the varied plans by which money is taken from the treasury without authority. The older we grow as a people, the more systematized and difficult of detection do the schemes become for plundering the public; and among them all, none are more prominent or successful than those which concern contracts and jobs."

CHAPTER X

MISRELIANCE ON CONTRACT UNENFORCEABLE BECAUSE OF PLAINTIFF'S BREACH

§ 162. In general.
§ 163 (I) The obligation to make restitution considered upon principle.
§ 164. (1) Misreliance on contract: Assumption of risk.
§ 165. Same: Breach of condition implied in law.
§ 166. (2) Retention of benefit inequitable: Effect of willful breach.
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§ 168. (*a*) The argument as to inequality.
§ 169. (*b*) The argument as to injustice.
§ 170. (*c*) The argument from analogous cases.
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§ 173. (II) The state of the law.
§ 174. (1) Service contracts.
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§ 178. (III) Measure of recovery.

§ 162. **In general.** — The purpose of this chapter is to consider the rights of one who has partly performed a contract, but is prevented by his own breach from enforcing it. There are few topics which exhibit so clearly the equitable character of quasi contractual obligations. For, notwithstanding the plaintiff's violation of his legal duty, if in reliance upon the broken contract he has conferred a benefit upon the defendant, and the circumstances are such that the retention of the benefit would be inequitable, he is entitled to restitution. Whether, in a given case, however, the plaintiff relied upon his contract or assumed the risk of failure, and under what circumstances the retention of the benefit would be inequitable, are questions upon which marked differences of opinion have developed. The decisions are in such confusion, indeed, that it will be

best first to consider the topic broadly and upon principle, and then to endeavor to ascertain the actual state of the law in various classes of cases.

§ 163. (I) **The obligation to make restitution considered upon principle.** — Two objections may be urged against the recognition of a quasi contractual obligation in favor of one who has broken his contract. One, that the essential element of misreliance upon the contract is wanting; the other, pertinent only in cases of willful breach, that the relief of one who has deliberately violated his obligation is both uncalled for as a matter of justice between the parties, and contrary to sound public policy. These two objections will be considered in the order named.

§ 164. (1) **Misreliance on contract: Assumption of risk.** — In one sense a contractor always "assumes the risk" of failure to discharge his obligation. For if he commits a breach he will be unable to enforce his contract and will himself be liable in damages. In reality, the risk of failure, in this sense, is imposed upon him by law, rather than assumed by him, for it makes no difference whether or not he is conscious of a doubt as to his ability to perform. But this is not the sort of "assumption of risk" that negatives the element of misreliance and bars a recovery in quasi contract (*ante*, § 16). To have such a result there must be a conscious "taking of a chance." It must appear that the contractor, when he entered into the contract, actually contemplated a contingency, which, if it happened, would cause him to violate his engagement, and nevertheless contracted without protecting himself against the contingency. In such a case he cannot say, when the contingency happens and he commits a breach, that he relied upon his ability to perform and the consequent enforceability of his contract. He deliberately "took a chance" that his contract might become unenforceable by the happening of that particular contingency, and cannot complain if his venture proved a losing one.

An illustration may serve to make the point clearer. Let it be supposed that A is about to contract for the manufacture

of certain machines for B. The delivery of all the machines within four months is a condition of the contract, but the price to be paid by B is a liberal one. A is unaware of any facts that will prevent him from getting the necessary skilled labor to do the work and anticipates no trouble in that direction. But he knows of certain conditions in the steel market that may make it impossible for him promptly to obtain the necessary materials. In view of the attractive terms of the contract, however, he decides to " take a chance " of getting the materials. The contract is duly made, and after part performance by A, he commits a breach. Now, if the breach is due to A's inability promptly to secure his materials — a contingency which he realized might happen — he cannot say that he was mistaken as to his ability to perform and consequently as to the enforceability of his contract. He deliberately took the chance of getting materials, and lost. There is no injustice in denying him relief. Moreover, to allow him to recover the value of his part performance would be to encourage the reckless assumption of contractual obligations. If, on the other hand, the breach is the result of A's inability to obtain competent labor — a contingency wholly unforeseen by him — he may truthfully claim that his party performance was in reliance upon the contract. He did not consciously " take a chance " of getting competent workmen, for he did not realize the possibility of difficulty in that direction. He did not, in the true sense, " assume the risk " of failure from that cause, and consequently, if the other elements of quasi contractual obligation are present, he should be granted relief.

In England, as appears in the chapter dealing with benefits conferred in reliance upon contracts which turn out to be impossible of performance (*ante*, § 112), the view is taken that the existence in a contract of a condition making the defendant's contractual liability depend upon complete performance by the plaintiff necessarily predicates such an assumption by the plaintiff of the risk of failure, from any cause whatsoever, as to negative misreliance upon the contract. It is accordingly held, as a rule, that one who is prevented by his own breach

from enforcing a contract can recover nothing in quasi contract.[1] Where the plaintiff's default is due to such impossibility of performance as excuses him from liability for damages, it seems clearly erroneous, as is elsewhere explained (*ante*, § 112), to raise a presumption that he assumed the risk of the after-event which made performance impossible. Where the plaintiff's default is not legally excusable but constitutes an actionable breach, a presumption that he assumed the risk of the after-event which caused the breach is not so unreasonable. It amounts to a presumption that he realized, when he entered into the contract, that the contingency which eventually brought about his breach might arise. But even in the case of a breach, it would seem fairer to assume, in the absence of evidence to the contrary, that the circumstances leading to the default were unanticipated at the time of the formation of the contract.

It should be added, perhaps, that an express provision in the contract to the effect that the promisor assumes the risk of inability to perform his engagement, and in case of breach shall have no right to recover the value of his part performance, would conclusively show that the promisor deliberately "took a chance" of failure, whether anticipated by him or not. Thus, where the plaintiffs contracted to do some threshing for the defendant and agreed that "if they did not do as good work as any machine in the county could do nothing would be charged," it was properly held that unless the plaintiffs performed according to the terms of their contract they could recover nothing.[2]

§ 165. **Same: Breach of condition implied in law.**—Professor Keener has endeavored to establish a distinction between conditions expressed in the contract or implied in fact and con-

[1] Sinclair *v.* Bowles, 1829, 9 Barn. & Cr. 92, (contract to repair a chandelier partly performed); Munro *v.* Butt, 1858, 8 El. & Bl. 738, (building contract to be completed by a specified time); Button *v.* Thompson, 1869, L. R. 4 C. P. 330, (service contract); Forman & Co. Proprietary *v.* The Ship "Liddesdale," [1900] A. C. 190, (repair contract). In the case of sales of goods, however, a different result is reached. See *post*, § 176.

[2] Crapson *v.* Wallace Bros., 1897, 71 Mo. App. 682, 684.

ditions implied in law, holding that the condition implied in law is not a genuine condition, *i.e.* a condition which represents the intention of the parties, but a fiction of the law of contract, and therefore that it should in no case be permitted to affect one's quasi contractual rights:[1]

"That conditions implied in law are not true conditions is as evident on reflection as that a quasi-contract is not a contract. A true condition is as much dependent upon actual intention as is a true contract, and conditions implied in law are only found where a party to a contract failed to protect himself by the insertion of conditions, express or implied in fact. A condition implied in law being then a creature of the law as distinguished from the creation of the parties to the contract, cannot be properly regarded as a true condition. . . . And as the law has imposed these conditions upon the plaintiff in favor of the defendant simply for the purpose of reaching equitable results, the court creating this condition should be at liberty, if it is deemed desirable, to create an obligation upon equitable principles in favor of the plaintiff against the defendant, it being one thing to say that the plaintiff shall not recover against the defendant under the contract, and quite another thing to say that he shall not recover in any form whatever."[2]

[1] "Quasi-Contracts," p. 225.

[2] Professor Keener's contention that conditions implied in law do not represent the actual intent of the parties is supported by Professors Williston and Costigan. See 7 Col. Law. Rev. 151, 152. "They are conditions," says Professor Costigan, "which rest not on any intention which the parties had but on that fair dealing which the court should require as between litigants." Professor Harriman, on the other hand, says, in his treatise on "Contracts" (§ 315): "Internal conditions are always gathered from the contract itself, and when they are implied by the law they are always implied because the law supposes that the intention of the parties is to treat a given fact as a condition, even though they have not manifested that intention in express words. The fact that the court always tries to discover the intention of the parties by looking at the entire contract, and that such intention is the sole rule for determining whether a given fact is or is not a condition, shows clearly that an internal condition implied by law is just as much a part of the real contract of the parties as if the condition had been set forth in express words."

If the premise be true that conditions implied in law do not rest upon the actual intent of the parties as inferred from the express terms of the contract, there is no basis whatever for the claim that a contractor assumes the risk of a failure to perform such conditions. And it is believed that the premise *ought* to be true. That is to say, the courts ought to recognize the futility of attempting to ascertain the unexpressed intention of the parties — to say nothing of the probability that they had no intention whatever in the matter — and treat the condition as a fiction invented in the interest of fair dealing. But the prevailing judicial dogma, it is feared, is that conditions implied in law are genuine conditions, resting upon the actual intent of the parties, as ascertained by an examination of the entire contract, and unless this view is abandoned, any distinction between express and implied conditions, as to their effect upon quasi contractual rights, is impossible.

§ 166. (2) **Retention of benefit inequitable: Effect of willful breach.** — It is a general rule, in cases of misreliance, that although all the other elements of obligation are present, proof of serious misconduct by the plaintiff toward the defendant will be held to justify a refusal to make restitution (*ante*, § 21). One of the forms of misconduct which ought, upon principle, to be so regarded is the *willful* breach of a contract:

Stark v. *Parker*, 1824, 2 Pick. (Mass.) 267; 13 Am. Dec. 425: Action to recover the value of services rendered under a contract which plaintiff without cause had abandoned. LINCOLN, J. (p. 271): "It cannot but seem strange to those who are in any degree familiar with the fundamental principles of law, that doubts should ever be entertained upon a question of this nature. Courts of justice are eminently characterized by their obligation and office to enforce the performance of contracts, and to withhold aid and countenance from those who seek, through their instrumentality, impunity or excuse for the violation of them. And it is no less repugnant to the well-established rules of civil jurisprudence, than the dictates of moral sense, that a party who deliberately and understandingly enters into an engagement and voluntarily breaks it,

should be permitted to make that very engagement the foundation of a claim to compensation for services under it."

Haslack v. *Mayers*, 1857, 26 N. J. L. 284: Indebitatus assumpsit to recover the value of nine shares of stock transferred by the plaintiff to the defendant in part performance of a contract for the purchase of the defendant's stock of groceries. The plaintiff subsequently refused to complete the purchase. POTTS, J. (p. 290): "The plaintiff here has deliberately broken his covenant with the defendant; and without the shadow of a pretext for having done so, asks, at the hands of a court of justice, to be remunerated in money for the stock he delivered to the defendant voluntarily in part performance of that covenant. For the court to aid him, would be to lend its aid to an act of bad faith. There is no hardship in the case. Let him perform his contract, and he will receive the remuneration he stipulated for; or, if it be now too late, the loss is the consequence of his own act."

The weight of authority, as will be seen later (*post*, § 174 *et seq.*), is in accord with principle, though the cases are in confusion, and the distinction between the willful contract breaker and one who honestly endeavors to perform but fails because of want of skill, or for other reasons not affecting good faith, is frequently overlooked.

§ 167. **Same: The doctrine of Britton v. Turner.** — The rule of no recovery for the willful contract breaker was challenged in the now famous New Hampshire case of *Britton* v. *Turner*,[1] in which it was held that one who voluntarily abandons a contract of service may recover to the extent of the benefit derived by his employer from his part performance, after deducting the damages resulting from the plaintiff's breach. The decision has been followed in other States (*post*, § 174 *et seq.*). Professor Scott, while conceding that the weight of authority is against it, declares that "the reason of the thing and the trend of legal development are clearly in favor of it";[2] and Judge DILLON, in *McClay* v. *Hedge*,[3] says: "That celebrated case has been criti-

[1] 1834, 6 N. H. 481; 26 Am. Dec. 713.
[2] "Cases on Quasi-Contracts," p. 761, n.
[3] 1864, 18 Ia. 66, 68.

cized, doubted, and denied to be sound. It is frequently said to be good equity, but bad law. Yet its principles have been gradually winning their way into professional and judicial favor. It is bottomed on justice, and is right upon principle, however it may be upon the technical and more illiberal rules of the common law, as found in the older cases." The case has provoked so much discussion and has such a considerable following that it cannot be passed without careful examination.

The chief grounds of the decision, gathered from the somewhat lengthy opinion of the court, will be separately stated and discussed.

§ 168. (*a*) **The argument as to inequality.** — The first argument advanced is that the rule denying a recovery in quasi contract to one who voluntarily fails to perform a contract of service (which, the court concedes, " has been considered the settled rule of law ") operates *unequally* in that the longer the plaintiff serves the more he is compelled to suffer for the breach. Says the court:[1]

"A party who contracts to perform certain specified labor and who breaks his contract in the first instance, without any attempt to perform it, can only be made liable to pay the damages which the other party has sustained by reason of such nonperformance, which in many instances may be trifling — whereas a party who in good faith has entered upon the performance of his contract, and nearly completed it, and then abandoned the further performance — although the other party has had the full benefit of all that has been done, and has perhaps sustained no actual damage — is in fact subjected to a loss of all which has been performed, in the nature of damages for the nonfulfillment of the remainder, upon the technical rule, that the contract must be fully performed in order to a recovery of any part of the compensation."

The *inequality* of the operation of the doctrine denying a recovery may be conceded. And if the doctrine rested, as the court seems to believe it rests, " upon the technical rule that the

[1] At page 486.

contract must be fully performed in order to a recovery of any part of the compensation," it might very properly be challenged. But it rests upon firmer ground, for the recovery is or ought to be denied not because the contract has not been fully performed, but because it has been *willfully* broken. Clearly, the willful contract breaker is not to be given the right to recover, merely because a denial of such right may cause him greater loss if he performs part of his engagement than if he disregards it from the beginning, or because such denial may result in a greater enrichment of the defendant in case of abandonment after part performance than in case of complete performance of the engagement. Such inequalities in the operation of the rule may be regrettable, but one whose hands are soiled by willful wrongdoing is hardly in a position seriously to complain of them.

§ 169. (*b*) **The argument as to injustice.** — The second ground of decision is that the rule denying a recovery is *unjust* in that its effect is to enable the defendant to retain a sum in excess of adequate compensatory damages for the plaintiff's breach. In the words of the court,[1] the defendant " may receive much more by the breach of the contract, than the injury which he has sustained by such breach, and more than he could be entitled to were he seeking to recover damages by an action."

This is perhaps the strongest argument that can be urged against the rule. But when it is remembered that the plaintiff's position is the direct consequence of a willful and inexcusable violation of his legal and moral duty to the defendant, it is difficult to feel that the result complained of is harsh or unjust. Better far that the innocent defendant should profit by the breach than that the guilty plaintiff should be given a remedy in spite of it. Moreover, even if some hardship to the plaintiff were conceded, the argument, it is submitted, would be distinctly outweighed by the consideration that the denial of relief must have a salutary effect in discouraging the willful breach of contractual obligations.

§ 170. (*c*) **The argument from analogous cases.** — The third point made by the court is that the case of service contracts is

[1] At page 487.

not distinguishable from those of building and sales contracts, in which one who commits a breach is permitted to recover in quasi contract the value of the benefit conferred by part performance:[1]

"The party who contracts for labor merely, for a certain period, does so with full knowledge that he must, from the nature of the case, be accepting part performance from day to day, if the other party commences the performance, and with knowledge also that the other may eventually fail of completing the entire term. If under such circumstances he actually receives a benefit from the labor performed, over and above the damage occasioned by the failure to complete, there is as much reason why he should pay the reasonable worth of what has thus been done for his benefit, as there is when he enters and occupies the house which has been built for him, but not according to the stipulations of the contract, and which he perhaps enters, not because he is satisfied with what has been done, but because circumstances compel him to accept it such as it is, that he should pay for the value of the house."

As to this argument it need only be said that the analogy relied upon by the court fails utterly, in that none of the cases of building and sales contracts cited in the opinion appears to be a case of *willful* breach. And the distinction, while very frequently overlooked, is a vital one.

§ 171. (*d*) **The argument as to severability of contract.** — The fourth and final ground of decision is that contracts of service, such as the one before the court, are usually intended by the parties to entitle the laborer to compensation for services rendered though he quits before the expiration of the contract period, and that in the absence of express stipulation to the contrary they should be so interpreted:[2]

"In fact we think the technical reasoning, that the performance of the whole labor is a condition precedent, and the right to recover anything dependent upon it — that the contract being entire there can be no apportionment — and that there being

[1] At page 489.

[2] At page 493.

an express contract no other can be implied, even upon the subsequent performance of service — is not properly applicable to this species of contract, where a beneficial service has been actually performed; for we have abundant reason to believe, that the general understanding of the community is, that the hired laborer shall be entitled to compensation for the service actually performed, though he do not continue the entire term contracted for, and such contracts must be presumed to be made with reference to that understanding, unless an express stipulation shows the contrary."

The answer to this argument is obvious. If the court really believed in its extraordinary theory as to the severability of the contract, it should have allowed a recovery *on the contract*, and there would then have been no occasion to appeal to quasi contractual principles. In another part of the opinion, however, the court says:[1] "It is clear, then, that he is not entitled to recover upon the contract itself, because the service, which was to entitle him to the sum agreed upon, has never been performed."

§ 172. (*e*) **Conclusion.** — In conclusion, then, all of the reasons upon which the decision is based appear to be either inadequate or unsound. Even the court by which it was handed down admitted, in a later case, that it had a "direct tendency to the willful and careless violation of express contracts fairly entered into."[2] Considerations both of justice and of policy forbid its approval.

§ 173. (II) **The state of the law.** — The right of one who has violated his contract having been considered upon principle, it becomes necessary to examine the authorities. For the sake of convenience, the cases arising from various types of contract — (1) service contracts, (2) building or working contracts, (3) contracts for the sale of goods, and (4) contracts for the payment of money — will be separately considered.

§ 174. (1) **Service contracts.** — By a very pronounced weight of authority, an employee who has willfully abandoned his

[1] At page 486.

[2] Woods, C.J., in Davis *v.* Barrington, 1855, 30 N. H. 517, 529.

employment is without a remedy against his employer.[1] There are several States, however, which follow the case of *Britton* v. *Turner*,[2] heretofore considered (*ante*, § 167 *et seq.*), and allow the employee to recover the value of his part performance, less the damages resulting from his breach.[3]

As to the rights of an employee discharged for good cause there is a closer division of authority.[4] In principle it would seem that if the cause of discharge involves a breach of faith by

[1] Henderson *v.* Stiles, 1853, 14 Ga. 135; Hansell *v.* Erickson, 1862, 28 Ill. 257; Hofstetter *v.* Gash, 1902, 104 Ill. App. 455; Callahan *v.* Stafford, 1866, 18 La. Ann. 556; Miller *v.* Goddard, 1852, 34 Me. 102; 56 Am. Dec. 638; Olmstead *v.* Beale, 1837, 19 Pick. (Mass.) 528; Davis *v.* Maxwell, 1847, 12 Metc. (Mass.) 286; Nelichka *v.* Esterly, 1882, 29 Minn. 146; 12 N. W. 457; Timberlake *v.* Thayer, 1894, 71 Miss. 279; 14 So. 446; 24 L. R. A. 231; Earp *v.* Tyler, 1881, 73 Mo. 617; Mather *v.* Brokaw, 1881, 43 N. J. L. 587; Natalizzio *v.* Valentino, 1904, 71 N. J. L. 500; 59 Atl. 8; McMillan *v.* Vanderlip, 1815, 12 Johns. (N. Y.) 165; 7 Am. Dec. 299; Lantry *v.* Parks, 1827, 8 Cow. (N. Y.) 63; Seaburn *v.* Zachman, 1904, 99 App. Div. 218; 90 N. Y. Supp. 1005; Larkin *v.* Buck, 1860, 11 Ohio St. 561; Steeples *v.* Newton, 1879, 7 Or. 110; 33 Am. Rep. 705; Hughes *v.* Cannon, 1853, 1 Sneed (33 Tenn.) 622; Winn *v.* Southgate, 1845, 17 Vt. 355; Diefenback *v.* Stark, 1883, 56 Wis. 462; 14 N. W. 621; 43 Am. Rep. 719.

[2] 1834, 6 N. H. 481; 26 Am. Dec. 713.

[3] Pixler *v.* Nichols, 1859, 8 Ia. 106; 74 Am. Dec. 298; Byerlee *v.* Mendel, 1874, 39 Ia. 382; Porter *v.* Whitlock, 1909, 142 Ia. 66; 120 N. W. 649; Duncan *v.* Baker, 1878, 21 Kan. 99; Murphy *v.* Sampson, 1902, 2 Neb. (Unof.) 297; 96 N. W. 494; Bedow *v.* Tonkin, 1894, 5 S. D. 432; 59 N. W. 222; Carroll *v.* Welch, 1861, 26 Tex. 147. And see Chamblee *v.* Baker, 1886, 95 N. C. 98.

[4] *Recovery not allowed:* Turner *v.* Robinson, 1833, 5 Barn. & Ad. 789; Ridgway *v.* Hungerford Market Co., 1835, 3 Ad. & El. 171; Hartman *v.* Rogers, 1886, 69 Cal. 643; 11 Pac. 581; (see Cal. Civil Code, § 2002); Posey *v.* Garth, 1841, 7 Mo. 94; 37 Am. Dec. 183; Lindner *v.* Cape Brewery, etc., Co., 1908, 131 Mo. App. 680; 111 S. W. 600; (*cf.* Anstee *v.* Ober, 1887, 26 Mo. App. 665); Lane *v.* Phillips, 1859, 6 Jones' L. (51 N. C.) 455, (*cf.* Pullen *v.* Green, 1876, 75 N. C. 215, 218).

Recovery allowed: Newman *v.* Reagan, 1879, 63 Ga. 755; Abendpost Co. *v.* Hertel, 1896, 67 Ill. App. 501; Fuqua *v.* Massie, 1894, 95 Ky. 387; 25 S. W. 875; Lawrence *v.* Gullifer, 1854, 38 Me. 532; Robinson *v.* Sanders, 1852, 2 Cushm. (24 Miss.) 391; Byrd *v.* Boyd, 1827, 4 McCord (S. C.) 246; 17 Am. Dec. 740; Massey *v.* Taylor, Wood & Co., 1868, 5 Coldw. (45 Tenn.) 447; 98 Am. Dec. 429; Hildebrand *v.* Amer. Fine Art Co., 1901, 109 Wis. 171; 85 N. W. 268; 53 L. R. A. 826.

the employee he should be regarded as no better than one who willfully abandons his engagement; but if the discharge is due to the employee's want of skill or strength or judgment he should be permitted to recover. This distinction has received little recognition in the decisions, however, and there are not a few cases in which an employee discharged for deliberate misconduct has been afforded relief.

If an employee neither willfully abandons his employment, nor is discharged by his employer, but nevertheless fails to satisfy the requirements of his contract, the same test of good faith should be applied. Thus, if he is discovered to have deliberately disobeyed the instructions of his employer or to have deliberately deceived or defrauded him, he should be denied compensation for his labor. There are cases in which it is so held,[1] although in jurisdictions which allow a recovery by one who has been discharged for deliberate misconduct, relief would probably be afforded. If, on the other hand, the employee's failure is the result of some mistake of judgment, or of want of skill, or of some untoward circumstance, there is no reason why he should be denied relief.

In Vermont it is well established that one who violates a condition of his contract is not entitled to recover for part performance.[2] But the rule appears to have been regarded as one of severe hardship, and it has been limited in its application to "contracts for service for a definite time, and those which are incapable of reasonable apportionment, unless they provide for a forfeiture of all benefit when not fully performed."[3] Accordingly, it has been held that one who abandons a contract to make staves at a specified price per piece,[4] or to clear land at a price

[1] Prescott *v.* White, 1885, 18 Ill. App. 322; World's Columbian Exposition *v.* Liesegang, 1894, 57 Ill. App. 594; Sipley *v.* Stickney, 1906, 190 Mass. 43; 76 N. E. 226; 5 L. R. A. (N. S.) 469; 112 Am. St. Rep. 309; Peterson *v.* Mayer, 1891, 46 Minn. 468; 49 N. W. 245; 13 L. R. A. 72.

[2] St. Albans Steamboat Co. *v.* Wilkins, 1836, 8 Vt. 54; Ripley *v.* Chipman, 1841, 13 Vt. 268; Forsyth *v.* Hastings, 1855, 27 Vt. 646.

[3] Jordan *v.* Fitz, 1884, 63 N. H. 227, 228.

[4] Booth *v.* Tyson, 1843, 15 Vt. 515.

per acre,[1] or to haul lumber at a price per thousand,[2] may recover for his part performance at the contract rate, after deducting the damages resulting from his breach.

§ 175. (2) **Building and like contracts.** — Under what is known as the doctrine of substantial performance — a doctrine which has its most frequent application in cases of building and like contracts — a contractor who in good faith endeavors to perform his contract in full and who succeeds in performing it substantially, though not in strict compliance with its requirements, is allowed in many jurisdictions to recover the contract price, less compensation to the defendant for defects in the performance.[3] The action, in these cases, is on the contract itself, and the obligation is in no sense quasi contractual.

In most jurisdictions it is rightly held that there can be no quasi contractual obligation in favor of a builder or other independent contractor who has willfully abandoned his engagement or wilfully departed from its terms.[4] But in a

[1] Dyer *v.* Jones, 1836, 8 Vt. 205.

[2] Jordan *v.* Fitz, 1884, 63 N. H. 227, (applying Vermont law).

[3] Mitchell *v.* Caplinger, 1911, 97 Ark. 278; 133 S. W. 1032; Keeler *v.* Herr, 1895, 157 Ill. 57; 41 N. E. 750; Elliott *v.* Caldwell, 1890, 43 Minn. 357; 45 N. W. 845; 9 L. R. A. 52; Anderson *v.* Todd, 1898, 8 N. D. 158; 77 N. W. 599; Nolan *v.* Whitney, 1882, 88 N. Y. 648; Spence *v.* Ham, 1900, 163 N. Y. 220; 57 N. E. 412; 51 L. R. A. 238; Foeller *v.* Heintz, 1908, 137 Wis. 169; 118 N. W. 543; 24 L. R. A. (N. S.) 327. For additional cases, see 30 Am. & Eng. Ency. of Law (2d ed.) 1221, n. 4. And see article by Professor Beale, "The Measure of Recovery upon Implied and Quasi-Contracts," 19 Yale Law Journal 609.

[4] Sumpter *v.* Hedges, [1898] 1 Q. B. 673; Mawxell & Delahomme *v.* Moore, 1909, 163 Ala. 490; 50 So. 882; Fish *v.* Correll, 1906, 4 Cal. App. 521; 88 Pac. 489; McGonigle *v.* Klein, 1895, 6 Colo. App. 306; 40 Pac. 465; Gill *v.* Volger, 1879, 52 Md. 663; Elliot *v.* Caldwell, 1890, 43 Minn. 357; 45 N. W. 845; 9 L. R. A. 52; Johnson *v.* Fehsefeldt, 1908, 106 Minn. 202; 118 N. W. 797; 20 L. R. A. (N. S.) 1069, (threshing contract); Wooten *v.* Reed, 1844, 2 Smedes & M. (10 Miss.) 585; Stroeh *v.* McClintock, 1908, 128 Mo. App. 368; 107 S. W. 416; Jennings *v.* Camp, 1816, 13 Johns. (N. Y.) 94; 7 Am. Dec. 367, (contract to clear and fence land); Cunningham *v.* Jones, 1859, 20 N. Y. 486; Spence *v.* Ham, 1900, 163 N. Y. 220; 57 N. E. 412; 51 L. R. A. 238; Norton *v.* U. S. Wood Co., 1903, 89 App. Div. 237; 85 N. Y. Supp. 886; Winstead *v.* Reid, 1852, Busb. L. (44 N. C.) 76; 57 Am.

few, under the doctrine of *Britton* v. *Turner*,[1] a recovery is allowed.[2]

As to the quasi contractual rights of a contractor whose breach is unintentional or unavoidable, the law is not so clear. In some jurisdictions he is denied relief.[3] But the weight of authority appears to support the just and reasonable rule that one who in good faith endeavors to perform, and whose perform-

Dec. 571; Schmidt *v.* North Yakima, 1895, 12 Wash. 121; 40 Pac. 790; Malbon *v.* Binney, 1860, 11 Wis. 107; Manitowac Steam, etc., Works *v.* Manitowac Glue Works, 1903, 120 Wis. 1; 97 N. W. 515. For Vermont doctrine, see Service Contracts, *ante*, § 174 and cases cited.

[1] 1834, 6 N. H. 481: 26 Am. Dec. 713.

[2] McKinney *v.* Springer, 1851, 3 Ind. 59; 54 Am. Dec. 470; McClay *v.* Hedge, 1864, 18 Ia. 66; Wolf *v.* Gerr, 1876, 43 Ia. 339, (contract to grade railway); Sheldon *v.* Leahy, 1896, 111 Mich. 29; 69 N. W. 76; Lee *v.* Ashbrook, 1851, 14 Mo. 378; 55 Am. Dec. 110; Danforth *v.* Freeman, 1898, 69 N. H. 466; 43 Atl. 621; Carroll *v.* Welch, 1861, 26 Tex. 147. And see Ætna Iron Works *v.* Kossuth Co., 1890, 79 Ia. 40; 44 N. W. 215; McKnight *v.* Bertram Heating, etc., Co., 1902, 65 Kan. 859; 70 Pac. 345; McMillan *v.* Malloy, 1880, 10 Neb. 228; 4 N. W. 1004; 35 Am. Rep. 471, (threshing contract).

[3] Sinclair *v.* Bowles, 1829, 9 Barn. & Cr. 92, (contract to repair chandeliers); Munro *v.* Butt, 1858, 8 El. & Bl. 738; Serber *v.* McLaughlin, 1901, 97 Ill. App. 104; Simpson Cons. Co. *v.* Stenberg, 1906, 124 Ill. App. 322; Morford *v.* Mastin, 1828, 6 T. B. Mon. (22 Ky.) 609; 17 Am. Dec. 168; Presbyterian Church *v.* Hoopes, etc., Co., 1887, 66 Md. 598; Riddell *v.* Peck-Williamson, etc., Co., 1902, 27 Mont. 44; 69 Pac. 241; Ferney *v.* Bardsley, 1901, 66 N. J. L. 239; 49 Atl. 443; Pullman *v.* Corning, 1853, 9 N. Y. 93; Smith *v.* Brady, 1858, 17 N. Y. 173; 72 Am. Dec. 442. In Smith *v.* Grady, *supra*, the court said (p. 190): "To conclude, there is, in a just view of the question, no hardship in requiring builders, like all other men, to perform their contracts in order to entitle themselves to payment, where the employer has agreed to pay only on that condition. It is true that such contracts embrace a variety of particulars, and that slight omissions and inadvertences may sometimes very innocently occur. These should be indulgently regarded, and they will be so regarded by courts and juries. But there can be no injustice in imputing to the contractor a knowledge of what his contract requires, nor in holding him to a substantial performance. If he has stipulated for walls of a given material and with a hard inside finish, he knows what he is to do and must perform it. . . . If he fails to perform when the requirement is plain, and when he can perform if he will, he has no right to call upon the courts to make a new contract for him; nor ought he to complain if the law leaves him without remedy."

ance, though seriously incomplete or defective, results in a benefit to the defendant which he elects to retain, may recover the reasonable value of his labor and materials, less the damages caused by his breach.[1] The occupation or use of a building is undoubtedly an election to retain the benefit of its construction.[2] The same is ordinarily true of the use of heating or other apparatus installed in a building. But where the occupation of one's building or the conduct of one's business necessitates the use of defective apparatus, such use, if accompanied by a request that the apparatus be either per-

[1] Dermott *v.* Jones, 1859, 23 How. (U. S.) 220; Thomas *v.* Ellis, 1842, 4 Ala. 108; Davis *v.* Badders, 1892, 95 Ala. 348; 10 So. 422; Bertrand *v.* Byrd, 1844, 5 Ark. 651; Katz *v.* Bedford, 1888, 77 Cal. 319; 19 Pac. 523; 1 L. R. A. 826; Bush *v.* Finucane, 1885, 8 Colo. 192; 6 Pac. 514; Pinches *v.* Swedish Church, 1887, 55 Conn. 183; 10 Atl. 264; Everroad *v.* Schwartzkopf, 1890, 123 Ind. 35; 23 N. E. 969; Ætna Iron, etc., Works *v.* Kossuth Co., 1890, 79 Ia. 40; 44 N. W. 215; White *v.* Oliver, 1853, 36 Me. 92; Howell *v.* Medler, 1879, 41 Mich. 641; 2 N. W. 911; Eaton *v.* Gladwell, 1899, 121 Mich. 444; 80 N. W. 292; Germain *v.* Union School Dist., 1909, 158 Mich. 214; 122 N. W. 524; Yeats *v.* Ballentine, 1874, 56 Mo. 530; Decker *v.* School Dist., 1903, 101 Mo. App. 115; 74 S. W. 390; McMillan *v.* Malloy, 1880, 10 Neb. 228; 4 N. W. 1004; 35 Am. Rep. 471, (threshing contract); Danforth *v.* Freeman, 1898, 69 N. H. 466; 43 Atl. 621; Woodford *v.* Kelly, 1904, 18 S. D. 615; 101 N. W. 1069, (contract to cut hay); Gove *v.* Island City, etc., Co., 1890, 19 Or. 363; 24 Pac. 521; Smith *v.* Packard, 1897, 94 Va. 730; 27 S. E. 586. In Pinches *v.* Swedish Church, *supra*, the court said (p. 187): "The hardship of this rule [that there can be no recovery unless the contract has been performed] upon the contractor who has undesignedly violated his contract, and the inequitable advantage it gives to the party who receives and retains the benefit of his labor and materials, has led to its qualification; and the weight of authority is now clearly in favor of allowing compensation for services rendered and materials furnished under a special contract, but not in entire conformity with it, provided that the deviation from the contract was not willful, and the other party has availed himself of and been benefited by such labor and materials."

[2] Davis *v.* Badders, 1892, 95 Ala. 348; 10 So. 422; Bush *v.* Finucane, 1885, 8 Colo. 192; 6 Pac. 514; Pinches *v.* Swedish Church, 1887, 55 Conn. 183; 10 Atl. 264; Everroad *v.* Schwartzkopf, 1890, 123 Ind. 35; 23 N. E. 969; White *v.* Oliver, 1853, 36 Me. 92; Eaton *v.* Gladwell, 1899, 121 Mich. 444; 80 N. W. 292; Germain *v.* Union School District, 1909, 158 Mich. 214; 122 N. W. 524. And see other cases cited in note 1, *supra*.

fected or removed, is not an election to retain the benefit of its installation.[1] So the use of a sidewalk, after notice that it must be either reconstructed according to contract or taken up, is not an election.[2]

In Massachusetts a contractor who has in good faith attempted to perform and who in fact has substantially performed or "done what he believed to be a compliance with the contract"[3] is not allowed to sue on the special contract,[4] but may recover on *quantum meruit*.[5]

§ 176. (3) **Contracts for the sale of goods.** — Contracts for the sale of goods differ from building and service contracts in that the buyer, upon the default of the seller after delivery of part of the goods, is often in a position to make restitution *in specie*. It is because of this fact, perhaps, that although in New York and a few other jurisdictions relief is persistently denied,[6] the weight of authority permits a recovery by the seller of the value of the goods delivered by him.[7] Even in England, where in other

[1] Manitowoc Steam Boiler Works, *v.* Manitowoc Glue Co., 1903, 120 Wis. 1; 97 N. W. 515. And see Fuller-Warren Co. *v.* Shurts, 1897, 95 Wis. 606; 70 N. W. 683; Madison *v.* American Sanitary Engineering Co., 1903, 118 Wis. 480; 95 N. W. 1097.

[2] Gwinnup *v.* Shies, 1903, 161 Ind. 500; 69 N. E. 158. And see Simpson Construction Co. *v.* Stenberg, 1906, 124 Ill. App. 322. *Cf.* Katz *v.* Bedford, 1888, 77 Cal. 319; 19 Pac. 523; 1 L. R. A. 826.

[3] Blood *v.* Wilson, 1886, 141 Mass. 25, 27; 6 N. E. 362.

[4] Allen *v.* Burns, 1909, 201 Mass. 74; 87 N. E. 194.

[5] Hayward *v.* Leonard, 1828, 7 Pick. (Mass.) 181; 19 Am. Dec. 268; Walker *v.* Orange, 1860, 16 Gray (Mass.) 195; Powell *v.* Howard, 1872, 109 Mass. 192; Blood *v.* Wilson, 1886, 141 Mass. 25; 6 N. E. 362; Sipley *v.* Stickney, 1906, 190 Mass. 43; 76 N. E. 226; 5 L. R. A. (N. S.) 469; 112 Am. St. Rep. 309; Douglas *v.* City of Lowell, 1907, 194 Mass. 268; 80 N. E. 510; Bowen *v.* Kimball, 1909, 203 Mass. 364; 89 N. E. 542; 133 Am. St. Rep. 302.

[6] Haslack *v.* Mayers, 1857, 26 N. J. L. 284; Brown *v.* Fitch, 1867, 33 N. J. L. 418; Champlin *v.* Rowley, 1835, 13 Wend. (N. Y.) 258; 1837, 18 Wend. (N. Y.) 187; Mead *v.* Degolyer, 1837, 16 Wend. (N. Y.) 632; Baker *v.* Higgins, 1860, 21 N. Y. 397; Catlin *v.* Tobias, 1863, 26 N. Y. 217; 84 Am. Dec. 183; Kein *v.* Tupper, 1873, 52 N. Y. 550; Nightingale *v.* Eiseman, 1890, 121 N. Y. 288; 24 N. E. 475; Witherow *v.* Witherow, 1847, 16 Ohio 238.

[7] McDonough *v.* Evans Marble Co., 1902, 112 Fed. 634; 50 C. C. A. 403; United States *v.* Molloy, 1906, 144 Fed. 321; 75 C. C. A. 283;

cases the right of a party in default to compensation for part performance is most confidently denied (*ante*, § 164), the seller of goods is afforded relief.[1]

In principle, as has been said before, the right of the party in default depends upon the character of his breach. But, while in some cases stress is laid on the injustice of allowing a recovery by a willful wrongdoer, and in others upon the injustice of denying relief to one who has endeavored in good faith to perform, the distinction between a willful and an unintentional or unavoidable breach has not been recognized as a test of the seller's right.

§ 177. (4) **Contracts for the payment of money.** — Whether one who has agreed to buy land or goods, or who has contracted for the services of another, and has defaulted after part payment in advance, can recover the amount paid by him, less the value of what he has received and damages resulting from his default, is a question upon which there is the usual difference

11 L. R. A. (N. S.) 487; Gibboney *v.* R. W. Wayne & Co., 1904, 141 Ala. 300; 37 So. 436; Richards *v.* Shaw, 1873, 67 Ill. 222; Bowker *v.* Hoyt, 1836, 18 Pick. (Mass.) 555; Heddon *v.* Roberts, 1883, 134 Mass. 38; 45 Am. Rep. 276; Clark *v.* Moore, 1853, 3 Mich. 55; Shaw *v.* Badger, 1825, 12 Serg. & R. (Pa.) 275; Viles *v.* Barre, etc., Power Co., 1906, 79 Vt. 311; 65 Atl. 104.

[1] Oxendale *v.* Wetherell, 1829, 9 Barn. & Cr. 386. Action to recover the price of 130 bushels of wheat sold and delivered. The defendant gave evidence to show that there was a contract for 250 bushels, and insisted that the plaintiff not having delivered more than 130 could not recover. Lord TENTERDEN (p. 387): "If the rule contended for were to prevail, it would follow, that if there had been a contract for 250 bushels of wheat, and 249 had been delivered to and retained by the defendant, the vendor could never recover for the 249, because he had not delivered the whole." PARKE, J. (p. 387): "Where there is an entire contract to deliver a large quantity of goods, consisting of distinct parcels, within a specified time, and the seller delivers part, he cannot, before the expiration of that time, bring an action to recover the price of that part delivered, because the purchaser may, if the vendor fail to complete his contract, return the part delivered. But if he retain the part delivered after the seller has failed in performing his contract, the latter may recover the value of the goods which he has so delivered." Approved in Colonial Ins. Co. *v.* Adelaide Marine Ins. Co., 1886, 12 A. C. 128, 138. See Williston, "Sales," § 460. *Query*, as to whether the seller would be allowed to recover, in England, if it appeared that the buyer had consumed the goods before the seller defaulted.

of opinion and the common failure to discriminate between a willful and an unintentional or unavoidable breach. By the weight of authority relief is denied,[1] but there are decisions allowing a recovery.[2]

§ 178. (III) **Measure of recovery.** — An examination of the cases in which a plaintiff in default is allowed to enforce a quasi contractual obligation shows that the judicial statement of the measure of damages is frequently, if not generally, inaccurate. In many cases it is declared that the plaintiff is entitled to recover the *contract price*, less the damages resulting to the defendant from the plaintiff's breach,[3] or less the cost to the defendant of completing the work which the plaintiff had undertaken.[4] Such a statement indicates a failure to dis-

[1] Wheeler *v.* Mather, 1870, 56 Ill. 241; 8 Am. Rep. 683, (land); Downey *v.* Riggs, 1897, 102 Ia. 88; 70 N. W. 1091, (land); Hillyard *v.* Banchor, 1911, 85 Kan. 516; 118 Pac. 67, (land); Grimes *v.* Goud, 1887, (Me.) 10 Atl. 116 (land); Ketchum *v.* Evertson, 1816, 13 Johns. (N. Y.) 359; 7 Am. Dec. 384, (land); Page *v.* McDonnell, 1873, 55 N. Y. 299, (land); Lawrence *v.* Miller, 1881, 86 N. Y. 131 (land: plaintiff unable to raise money); Wright *v.* Smith, 1897, 13 App. Div. 536; 43 N. Y. Supp. 728, (contract to erect a building bearing plaintiff's name); Beveridge *v.* West Side Const. Co., 1909, 130 App. Div. 139; 114 N. Y. Supp. 521, (land); Hathaway *v.* Hoge, 1885, (Pa.) 1 Atl. 392, (land: plaintiff bankrupt); Sanders *v.* Brock, 1911, 230 Pa. St. 609; 79 Atl. 772, 35 L. R. A. (N. S.) 711, (land); Estes *v.* Browning, 1853, 11 Tex. 237; 60 Am. Dec. 238.

[2] Cherry Valley Iron Works *v.* Florence Iron Co., 1894, 64 Fed. 569; 12 C. C. A. 306; 22 U. S. App. 655, (ore); Michigan Yacht Co. *v.* Busch, 1906, 143 Fed. 929; 75 C. C. A. 109, (contract for purchase of yacht to be built by defendant); Gilbreth *v.* Grewell, 1859, 13 Ind. 484; 74 Am. Dec. 266, (land). And see Davis *v.* Barada-Ghio Real Estate Co., 1905, 115 Mo. App. 327; 92 S. W. 113, 118, (land).

[3] Richards *v.* Shaw, 1873, 67 Ill. 222, (sale of goods); Byerlee *v.* Mendel, 1874, 39 Ia. 382, 386, (services); Hayward *v.* Leonard, 1828, 7 Pick. (Mass.) 181; 19 Am. Dec. 268, (building contract: but see Gillis *v.* Cobe, 1901, 177 Mass. 584; 59 N. E. 455); Bowker *v.* Hoyt, 1836, 18 Pick. (Mass.) 555, (sale of goods); McMillan *v.* Malloy, 1880, 10 Neb. 228, 234; 4 N. W. 1004; 35 Am. Rep. 471, (threshing contract: but see Murphy *v.* Sampson, 1902, 2 Neb. (Unof.) 297; 96 N. W. 494); Hildebrand *v.* The American Fine Art Co., 1901, 109 Wis. 171, 179–182; 85 N. W. 268; 53 L. R. A. 826, (services). See Clark *v.* Moore, 1853, 3 Mich. 55, (sale of goods).

[4] McClay *v.* Hedge, 1864, 18 Ia. 66, (building contract); Ætna Iron Works *v.* Kossuth County, 1890, 79 Ia. 40, 46; 44 N. W. 215, (building

tinguish the case under consideration from that of substantial performance. In fact, as has been pointed out (*ante*, § 175), the two are essentially different. For in the latter the obligation is contractual and the action is to recover the agreed price, while in the former the obligation is quasi contractual and the action is to recover the reasonable value of the benefit conferred by part performance. Of such reasonable value the price agreed upon is certainly evidence; but the two are not necessarily identical.

In the Massachusetts case of *Gillis* v. *Cobe*,[1] there is an implication, at least, that the measure of recovery, in the case of a building which has been constructed in good faith but not in accordance with the requirements of the contract, is "the fair market value of the building as it now exists." The objection to this is that the market value of the building may be much less than the value of the plaintiff's labor and materials, not because of the plaintiff's failure to fulfill the requirements of the contract, but because of the poor judgment of the defendant in planning the building, or for other causes. As was said in a dissenting opinion by Judge KNOWLTON:[2]

"Whether the investment in the building turns out profitably or improfitably to the owner, is of no consequence. . . . If, through bad management, miscalculation or misfortune for which the builder is not responsible, the owner is unable profitably to use the building for the purpose for which it was intended, this cannot be shown to diminish the sum to be recovered. A building may be so constructed for use in a particular kind of business that it would be worth but little for any other use, and before it was completed the business may become unprofitable, and the building be of little value on that account. No one will contend that in such a case the recovery of the builder is to be limited by the value of the building to the owner."

Another frequent statement of the measure of recovery is that the plaintiff is entitled to the value of his part performance,

contract); Hillyard *v.* Crabtree, 1854, 11 Tex. 264; 62 Am. Dec. 475, (services).

[1] 1901, 177 Mass. 584, 59 N. E. 455. [2] At page 602.

not exceeding the contract price, less the damages suffered by the defendant.[1] Whether the words " not exceeding the contract price " are intended to mean that the plaintiff's part performance must not be given a value greater than the price agreed upon for full performance, or that in computing the value of the plaintiff's part performance the *rate* of compensation fixed by the contract must not be exceeded, is not always clear. But under either interpretation the limit established by this statement of the rule is not the true one. The underlying notion is that whatever may be the actual value of the defaulting plaintiff's part performance, the defendant, who is not in default, should under no circumstances be charged for such part performance at a rate higher than that which his contract indicates that he was willing to pay. It is not the aggregate contract price, therefore, which should limit the plaintiff's recovery, but such a proportion of the contract price as the value of the part performance bears to the value of full performance.[2] And while this is or-

[1] United States *v.* Molloy, 1906, 144 Fed. 321; 75 C. C. A. 283; 11 L. R. A. (N. S.) 487, (sale of goods); Davis *v.* Badders, 1892, 95 Ala. 348; 10 So. 422, 423, (building contract); Gibboney *v.* R. W. Wayne & Co., 1904, 141 Ala. 300; 37 So. 436, (sale of goods); Pinches *v.* Swedish Church, 1887, 55 Conn. 183; 10 Atl. 264, (building contract); Duncan *v.* Baker, 1878, 21 Kan. 99, 106, 109, (service); McKnight *v.* Bertram Heating, etc., Co., 1902, 65 Kan. 859; 70 Pac. 345, (heating plant); White *v.* Oliver, 1853, 36 Me. 92, (building contract); Lawrence *v.* Gullifer, 1854, 38 Me. 532, (service); Allen *v.* McKibben, 1858, 5 Mich. 449, (cutting and hauling timber); Eaton *v.* Gladwell, 1899, 121 Mich. 444, 449; 80 N. W. 292, (building contract); Yeats *v.* Ballentine, 1874, 56 Mo. 530, 534, (plumbing contract); Decker *v.* School District, 1903, 101 Mo. App. 115; 74 S. W. 390, (building contract); Danforth *v.* Freeman, 1898, 69 N. H. 466; 43 Atl. 621, (building contract); Gove *v.* Island City, etc., Co., 1890, 19 Or. 363; 24 Pac. 521, (building contract); Bedow *v.* Tonkin, 1894, 5 S. D. 432; 59 N. W. 222, 224, (service); Massey *v.* Taylor, Wood & Co., 1868, 5 Coldw. (45 Tenn.) 447; 98 Am. Dec. 429, (service); Carroll *v.* Welch, 1861, 26 Tex. 147, (service: court cites Hillyard *v.* Crabtree, *supra*, as standing for same rule); Viles *v.* Barre, etc., Power Co., 1906, 79 Vt. 311; 65 Atl. 104, (sale of electric current). See Germain *v.* Union School District, 1909, 158 Mich. 214, 218; 122 N. W. 524; 123 N. W. 798, where it is said that the plaintiff may recover the value of the building as defendant took possession of it, not exceeding the contract price, less the cost of making it comply with the contract. This is clearly wrong.

[2] See McKinney *v.* Springer, 1851, 3 Ind. 59, 65, 67–9; 54 Am. Dec. 470.

dinarily equivalent to the statement that in computing the value of the plaintiff's performance the rate established by the terms of the contract must not be exceeded, such is not the case where the contract stipulates a flat rate for services or materials, the various parts or units of which differ in value. This is explained and illustrated in the chapter dealing with the quasi contractual rights of one whose default is excused by impossibility (*ante*, § 125).

Accurately stated, then, the measure of recovery is the reasonable value of the plaintiff's part performance, not exceeding such proportion of the contract price for full performance as the value of the part performance bears to the value of full performance, less the damages resulting to the defendant from the plaintiff's breach.

3 Chap

CHAPTER XI

MISRELIANCE ON SUPPOSED REQUIREMENT OF VALID CONTRACT

§ 179. In general: Mistake as to terms of contract or fact affecting obligation to perform.
§ 180. The right to recover money paid in performance of contract reformable in equity.
§ 181. The right to recover money paid in performance of parol contract which does not express intention of parties.
§ 182. The right to recover money paid by drawee of negotiable paper under mistake as to state of drawer's account.

§ 179. **In general: Mistake as to terms of contract or fact affecting obligation to perform.** — The obligation resulting in various cases from the receipt of a benefit conferred in misreliance upon a contract which turns out to be invalid or unenforceable has been considered in the preceding chapters. Upon the same underlying principle, and with the same limitations, the receipt of a benefit conferred under a mistake as to the terms of a valid and enforceable contract,[1] or as to the existence of a fact affecting the obligation to perform a contract,[2] or as

[1] Pearson *v.* Lord, 1809, 6 Mass. 81, (payment by underwriter in ignorance either that defendant had insured more than his own interest in ship and cargo, or that insurance was restricted, by terms of policy, to interest of defendant).

[2] Bize *v.* Dickason, 1786, 1 Term R. 285, (overpayment by creditor of bankrupt to assignee in bankruptcy, because of plaintiff's ignorance that he could set off claim against bankrupt); Irving *v.* Richardson, 1831, 2 Barn. & Ad. 193, (overpayment on policy of marine insurance in ignorance of fact that there was other insurance); Kelly *v.* Solari, 1841, 9 Mees. & Wels. 54, (payment of lapsed insurance policy); Mills *v.* The Alderbury Union, 1849, 3 Exch. 590, (payment by surety on bond under mistaken belief that the principal had defaulted); Ray & Thornton *v.* Bank of Kentucky, 1843, 3 B. Mon. (42 Ky.) 510; 39 Am. Dec. 479, (plaintiff ignorant that he was exonerated from payment of bill because of defendant's failure to present to acceptor on time); Baltimore, etc., R. Co. *v.* Faunce, 1847, 6 Gill (Md.) 68; 46 Am. Dec. 655, (plaintiff's agent in settling with defendant overlooked a credit and so

to the amount of money or property called for by a contract,[1] raises an obligation to make restitution.

overpaid him); Pearson *v.* Lord, 1809, 6 Mass. 81, (payment by underwriter in ignorance either that defendant had insured more than his own interest in ship and cargo, or that insurance was restricted, by terms of policy, to interest of defendant); Garland *v.* Salem Bank, 1812, 9 Mass. 408; 6 Am. Dec. 86; Talbot *v.* Nat. Bank of Commonwealth, 1880, 128 Mass. 67; 37 Am. Rep. 302, (payment of note by indorser under mistaken belief that it had been dishonored); Merchants' Ins. Co. *v.* Abbott, 1881, 131 Mass. 397, (payment of insurance in ignorance of facts avoiding policy); Nollman *v.* Evenson, 1895, 5 N. D. 344; 65 N. W. 686, (payment on contract for plastering under mistaken belief that work had been properly done); Phetteplace *v.* Bucklin, 1893, 18 R. I. 297; 27 Atl. 211, (payment of lapsed legacy by surety of executor); Guild *v.* Baldridge, 1852, 2 Swan (32 Tenn.) 294, (plaintiff twice paid price of logs purchased by him); Turner Falls Lumber Co. *v.* Burns, 1899, 71 Vt. 354; 45 Atl. 896, (payment for timber purchased from defendant under mistake as to boundary).

[1] *Money*: Townsend *v.* Crowdy, 1860, 8 C. B. N. S. 477, (overpayment on purchase of interest in partnership under mistake as to amount of profits); Newall *v.* Tomlinson, 1871, L. R. 6 C. P. 405, (overpayment for goods purchased, as result of error in computing weight); First Nat. Bank of Omaha *v.* Mastin Bank, 1880, 2 McCrary (U. S. C. C.) 438; 48 Fed. 433, (overpayment under mistake as to state of account between two banks); Griffith *v.* Johnson's Admr. 1837, 2 Harr. (Del.) 177, (overpayment on bond); Devine *v.* Edwards, 1881, 101 Ill. 138, (overpayment for milk due to mistake as to capacity of milk cans); Worley *v.* Moore, 1884, 97 Ind. 15, (overpayment on notes due to miscalculation of interest); Stotsenburg *v.* Fordice, 1895, 142 Ind. 490; 41 N. E. 313, 810, (overpayment of debt; interest computed at 8 per cent instead of 6 per cent); Major *v.* Tardos, 1859, 14 La. Ann. 10 (overpayment of debt by reason of compounding interest); Goddard *v.* Putnam, 1843, 22 Me. 363, (overpayment of note under mistaken impression that it bore interest from date); Baltimore, etc., R. Co. *v.* Faunce, 1847, 6 Gill (Md.) 68; 46 Am. Dec. 655, (plaintiff's agent in settling with defendant overlooked a credit and so overpaid him); Stuart *v.* Sears, 1875, 119 Mass. 143 (overpayment in settlement of account under mistake as to previous payments); Trecy *v.* Jefts, 1889, 149 Mass. 211; 21 N. E. 360, (overpayment under mistake as to amount of debt); Lane *v.* Pere Marquette Boom Co., 1886, 62 Mich. 63; 28 N. W. 786, (overpayment for driving logs as a result of mistake in woods scale); City of Duluth *v.* McDonnell, 1895, 61 Minn. 288; 63 N. W. 727, (overpayment of contractor resulting from mistake in measurement of work done); Billings *v.* McCoy Brothers, 1876, 5 Neb. 187, (overpayment for cattle due to mistake in weighing); Wheadon *v.* Olds, 1838, 20 Wend. (N. Y.) 174, (overpayment for oats purchased, a result of error in estimating quantity); George *v.* Tallman, 1871, 5 Lans. (N. Y. Sup. Ct.)

The fact that in a given case the mistake is as to the requirement of a contract with a *third person* instead of with the defendant is immaterial, if it is a mistake affecting the *duty*, and not merely the *policy*, of doing that which benefits the defendant (*ante*, § 19). This was not appreciated, apparently, in the Vermont case of *Johnson* v. *Boston and Maine Railroad Company*,[1] for it was there held that the plaintiff, who made certain transfers of mail under the mistaken belief, shared by the defendant, that his contract with the government required him so to do, whereas in fact the duty of making the transfers rested upon the defendant, could recover nothing for his services. The Supreme Court of Michigan, however, in a similar case permitted a recovery.[2]

§ 180. **The right to recover money paid in performance of contract reformable in equity.** — May one recover, in an action at law, money paid in excess of what was justly due the

392, (overpayment on contract to buy land due to mistake in survey); Calkins *v.* Griswold, 1877, 11 Hun (N. Y. Sup. Ct.) 208, (overpayment for grapes under mistake as to quantity); Ransom *v.* Masten, 1889, 52 Hun (N. Y. Sup. Ct.) 610; 4 N. Y. Supp. 781, (overpayment due to fact that defendant filled contract calling for "pounds" with "packages" weighing ½ lb.); Payne *v.* Witherbee, Sherman & Co., 1909, 132 App. Div. 579; 117 N. Y. Supp. 15, (overpayment due to mistake in computing amount due under contract for electric power); Simms *v.* Vick, 1909, 151 N. C. 78; 65 S. E. 621; 24 L. R. A. (N. S.) 517, (overpayment on note due to fact that payor had forgotten previous payment); Houston, etc., R. Co. *v.* Hughes, 1911, Tex. Civ. App. ; 133 S. W. 731, (overpayment of contractor for construction of road bed); Noyes *v.* Parker, 1892, 64 Vt. 379; 24 Atl. 12, (overpayment under mistake as to quantity of butter delivered).

Property: Inman *v.* White Lumber Co., 1910, 14 Cal. App. 551; 112 Pac. 560, (ties delivered in excess of number required by contract); Johnson *v.* Saum, 1904, 123 Ia. 145; 98 N. W. 599, (mare delivered in payment of debt in ignorance of fact that part of debt had previously been paid); Caldwell *v.* Dawson, 1862, 4 Metc. (61 Ky.) 121, (delivery of charcoal in excess of amount called for by contract); Pittsburg Plate Glass Co. *v.* McDonald, 1903, 182 Mass. 593; 66 N. E. 415, (plaintiff by mistake furnished more glass than was called for by contract: no recovery, chiefly on the ground that the defendant received no benefit).

[1] 1897, 69 Vt. 521; 38 Atl. 267.

[2] McClary *v.* Michigan, etc., R. Co., 1897, 102 Mich. 312; 60 N. W. 695.

defendant, where it appears that such excess was called for by the terms of a written contract which is valid and enforceable at law but which, because of a mistake in its formation, does not express the actual intention of the parties? If the mistake is such that a court of equity would not reform the contract, it is clear that there can be no relief at law. At least, it would be an absurd anomaly to compel a defendant to restore that which the courts of both law and equity would have assisted him to obtain. But what if the mistake is of such a character that the plaintiff is entitled to a reformation of the contract, and therefore by a resort to equity might successfully have resisted the collection of the sum sought to be recovered?

Relief at law has been denied in such cases upon the ground that, except in a proceeding in equity for the reformation of the contract, parol evidence cannot be admitted to show that the parties intended to make a contract different from that set out in the instrument:

Boyce v. *Wilson*, 1869, 32 Md. 122: Action for money had and received. The plaintiff agreed to buy from the defendant certain real estate and mining stocks, at certain valuations. According to the testimony of the plaintiff, they made a calculation of the amount the plaintiff was to pay and found it to be $90,322. The agreement was then reduced to writing, but the plaintiff subsequently, and after paying the consideration set out in the contract, discovered that the calculation had been made on an erroneous basis and that the sum which ought to have been expressed was $81,250. MAULSBY, J. (p. 127): "Can the parol evidence vary the written contract, by striking therefrom the consideration expressed in it, and inserting in its stead another reduced consideration? The plaintiff has made no mistake which a court of law can correct, if he has paid only that sum which his contract obliged him to pay. He cannot recover at law a sum paid by mistake, unless that sum were over and above what he had contracted to pay. . . . The written contract may not have been in accordance with the intention of the parties. It may have expressed, by mistake, one consideration, when the real intention out of mind at the moment of its execution, was that it should have expressed

another. But, whatever may have been the mistake, or how produced, it can find no recognition until the written contract shall have been reformed and made to conform to the intention of the parties, and this a court of law cannot effect. A court of equity alone can reform a written contract." [1]

[1] For the same reason it is held in some jurisdictions that where an agreement is made for the sale of land and a mistake as to the price is carried into the recitals of the deed of conveyance, money paid as a result of such mistake cannot be recovered in an action at law. Carter *v.* Beck, 1867, 40 Ala. 599; Williams *v.* Hathaway, 1837, 19 Pick. (Mass.) 387; (*cf.* Cardinal *v.* Hadley, 1893, 158 Mass. 352; 33 N. E. 575); Howes *v.* Barker, 1808, 3 Johns. (N. Y.) 506; 3 Am. Dec. 526, (but see, *contra*, Wilson *v.* Randall, 1876, 67 N. Y. 338); Farmers', etc., Bank *v.* Galbraith, 1849, 10 Pa. St. 490; 51 Am. Dec. 498; Kreiter *v.* Bomberger, 1876, 82 Pa. St. 59; 22 Am. Rep. 750. In Howes *v.* Barker, *supra*, Chief Justice KENT said (p. 510): "I confess that I have struggled hard, and with the strongest inclination, to see if the action for *money had and received* would not help the plaintiff in this case; but I cannot surmount the impediment of the *deed*, which the plaintiff has accepted from the defendant, and which contains a specific consideration in money, and the quantity of acres conveyed, with the usual covenant of seisin. Sitting in a court of law, I think I am bound to look to that deed, as the highest evidence of the final agreement of the parties, both as to the quantity of the land to be conveyed, and the price to be given for it. If there be a *mistake* in the deed, the plaintiff must resort to a court of equity, which has had a long established jurisdiction in all such cases; and where even parol evidence is held to be admissible to correct the mistake."

In other jurisdictions the deed is not regarded as concluding the parties as to the consideration agreed to be paid: Solinger *v.* Jewett, 1865, 25 Ind. 479; 87 Am. Dec. 372; (quoted with approval in Wolcott *v.* Frick, 1907, 40 Ind. App. 236: 81 N. E. 731); Goodspeed *v.* Fuller, 1858, 46 Me. 141; 71 Am. Dec. 572; Cardinal *v.* Hadley, 1893, 158 Mass. 352; 33 N. E. 575 (*cf.* Williams *v.* Hathaway, 1837, 19 Pick. (Mass.) 387); White *v.* Miller, 1850, 22 Vt. 380; Butt *v.* Smith, 1904, 12 Wis. 566; 99 N. W. 328; 105 Am. St. Rep. 1039, (*cf.* Ohlert *v.* Alderson, 1893, 86 Wis. 433; 57 N. W. 88). In White *v.* Miller, *supra*, the court said (p. 386): "The purpose, for which the deed is made, is not to state the contract between the parties in regard to the terms of the purchase, *but to pass the title to the land.* The deed is not, strictly speaking, an agreement between the grantor and the grantee. It is executed by the grantor alone, and is a declaration by him, addressed to all mankind, informing them that he thereby conveys to the grantee the land therein described. The object *is to pass the title*, — not to declare the terms upon which the land had been sold and the mode in which payment was to be made. . . . It is not intended to say, that the terms of a contract of sale may not be recited in the deed; and when the

To this argument Professor Keener replies that the parol evidence is introduced not for the purpose of varying the terms of the contract but merely for the purpose of showing that by reason of a mistake in its formation, the retention by the defendant of a certain sum of money, paid to him according to its terms, is inequitable.[1] Conceding the soundness of this limitation of the parol evidence rule, the objection remains that to grant relief is in effect to reform the instrument in an action at law. In jurisdictions where equitable defenses are allowed at law, this objection may not be substantial; but it would be manifestly absurd for a court of law to refuse to listen to evidence of the mistake when offered as a defense to an action to enforce the contract, and forthwith, in an action for money had and received brought by the defendant in the former action, admit the evidence and decree restitution.

§ 181. **The right to recover money paid in performance of parol contract which does not express intention of parties.** — The right of one to recover, in an action at law, money paid in performance of a *written* contract which, because of a mutual mistake in its formation, does not express the intent of the parties and is therefore reformable in equity, was considered in the last section. If the contract is not in writing, it is clearly unnecessary to resort to equity; an action at law may be maintained to recover whatever has been paid in excess of the amount justly due.[2] As was said in *Sheffield* v. *Hamlin:*[3]

"In a case of mistake in a written contract, the necessity for reforming the contract before seeking to enforce it according to the intent of the parties arises from the rule of evidence, that the written paper is to be treated as a full and correct ex-

design to do so is apparent, effect should doubtless be given to the recital. But when the language of the deed, as in the present case, is general, and the words used may have their full force, as descriptive of the land, we think they should not be construed to conclude the parties in regard to the terms of the contract."

[1] Keener, "Quasi-Contracts," pp. 123, 124.

[2] Norton *v.* Bohart, 1891, 105 Mo. 615; 16 S. W. 598; Sheffield *v.* Hamlin, 1882, 26 Hun (N. Y. Sup. Ct.) 237.

[3] 1882, 26 Hun (N. Y. Sup. Ct.) 237, 238.

pression of the intent, and it cannot be varied by parol; but when the contract rests in parol the intent of the parties may be shown by oral proof, and when the intent is ascertained it is to control."

§ 182. **The right to recover money paid by drawee of negotiable paper under mistake as to state of drawer's account.** — Money paid by the drawee of a negotiable instrument in the mistaken belief that the drawer's account shows a balance sufficient to meet the instrument is not recoverable.[1] Most of the theories that have been advanced in explanation of the denial of relief to the drawee who pays under a mistake as to the genuineness of the signature of the drawer (*ante*, § 81 *et seq.*) have also been called to the support of the present rule. It seems probable that, in the latter case, as in the former, the rule is chiefly attributable to the policy of maintaining confidence in the security of negotiable paper (*ante*, § 87).

The entry of the amount of a check in the depositor's pass book, followed by the entry of it in the books of the bank to the credit of the depositor and the debit of the drawer, is regarded as the equivalent of payment;[2] but the mere receipt of the check by the bank is not.[3] Whether the entry of the check

[1] Chambers *v.* Miller, 1862, 13 C. B. N. S. 125; Pollard *v.* Bank of England, 1871, L. R. 6 Q. B. 623; Riverside Bank *v.* First Nat. Bank, 1896, 74 Fed. 276; 20 C. C. A. 181; 38 U. S. App. 674; First Nat. Bank of Denver *v.* Devenish, 1890, 15 Colo. 229; 25 Pac. 177; 22 Am. St. Rep. 394; Manufacturers' Nat. Bank *v.* Swift, 1889, 70 Md. 515; 17 Atl. 336; 14 Am. St. Rep. 381; National Bank *v.* Berrall, 1904, 70 N. J. L. 757; 58 Atl. 189; 66 L. R. A. 599; 103 Am. St. Rep. 821, (payment stopped); Oddie *v.* Nat. City Bank, 1871, 45 N. Y. 735; 6 Am. Rep. 160; (but see Nat. Park Bank *v.* Steele, etc., Co., 1890, 58 Hun 81; 11 N. Y. Supp. 538); Hull *v.* Bank of South Carolina, 1838, Dudley (S. C.) 259; Citizens' Bank *v.* Schwarzschild, 1909, 109 Va. 539; 64 S. E. 954; 23 L. R. A. (N. S.) 1092.

In Massachusetts a recovery will be allowed unless the payee shows a change of position. Merchants' Nat. Bank *v.* Nat. Eagle Bank, 1869, 101 Mass. 281; 100 Am. Dec. 120; Merchants' Nat. Bank *v.* Nat. Bank of Commonwealth, 1885, 139 Mass. 513; 2 N. E. 89; (but see Boylston Bank *v.* Richardson, 1869, 101 Mass. 287).

[2] City Nat. Bank *v.* Burns, 1880, 68 Ala. 267; 44 Am. Rep. 138.

[3] Boyd *v.* Emmerson, 1834, 2 Ad. & Ell. 184.

in the depositor's pass book alone is enough is not settled.[1] In some of the larger cities clearing house rules prescribe a time limit within which negotiable paper found to be not good because of lack of funds may be returned. As between banks dealing under such a rule, the return of paper within the time limit gives to the drawee the right to recover. In some cases delay beyond the time limit is held to be fatal;[2] in others the rule is more liberally construed, and unless the plaintiff is guilty of laches or the defendant's position is altered, a recovery is allowed.[3]

[1] That it is not equivalent to payment: Nat. Gold Bank *v.* McDonald, 1875, 51 Cal. 64; 21 Am. Rep. 697. But see Oddie *v.* Nat. City Bank, 1871, 45 N. Y. 735; 6 Am. Rep. 160; Levy *v.* Bank of U. S., 1802, 4 Dall. (Pa.) 234.

[2] Preston *v.* Canadian Bank, 1883, 23 Fed. 179, (D. C. Ill.)

[3] Merchants' Nat. Bank *v.* Nat. Eagle Bank, 1869, 101 Mass. 281; 100 Am. Dec. 120; Merchants' Nat. Bank *v.* Nat. Bank of Commonwealth, 1885, 139 Mass. 513; 2 N. E. 89.

CHAPTER XII

MISRELIANCE ON NON-CONTRACT OBLIGATION

§ 183. In general.
§ 184. Misreliance on duty incident to status.
§ 185. Misreliance on duty as executor or administrator.

§ 183. **In general.** — Perhaps the greater number of primary legal duties, outside the field of contracts, are negative rather than positive, *i.e.* require one to refrain from acting rather than to act. There are many positive non-contractual obligations, however, and one who confers a benefit in the mistaken belief that he is performing such an obligation, is ordinarily entitled to restitution. It has accordingly been held that a coalmeter of London who mistakenly paid rent to the mayor and subsequently paid it again to the chamberlain, who was entitled to receive it, could recover the money paid to the mayor;[1] that one who paid an assessment upon another's property for a street improvement, under the misapprehension that the assessment was upon his own property,[2] or who paid an assessment upon his own property under the misapprehension that his vendor had not paid it,[3] could recover from the payee

[1] Bonnel *v.* Foulke, 1657, 2 Sid. 4. The mistake in this case appears to have been a mistake of law. As to money paid under mistake of law, see *ante*, § 35 *et seq.*

[2] Mayer *v.* Mayor, etc., of New York, 1875, 63 N. Y. 455. In this case ANDREWS, J., said (p. 458): "The circumstances bring the case within the general rule, which authorizes a recovery for money paid by mistake. . . . The city received the money upon a lawful demand, but from a person who was not legally liable to pay it, and we do not find that the circumstance that money paid by mistake is received upon a valid claim in favor of the recipient against a third person prevents a recovery back, provided the claim against the party who ought to pay it is not thereby extinguished or its collection prevented."

[3] Nevin *v.* Mankini, 1898, 20 Ky. Law Rep. 224; 45 S. W. 669.

the amount paid; that one who mistakenly paid a tax upon property not liable to assessment,[1] or an amount in excess of the tax levied upon his property,[2] was entitled to restitution; that one who paid a sum of money in compromise of a threatened action to collect a penalty for running a tollgate, in the belief that he was liable to pay the penalty, whereas in fact no such penalty was provided for by law, could recover the money paid.[3]

§ 184. **Misreliance on duty incident to status.** — Of the class of cases under consideration in this chapter are those in which a recovery is sought for services rendered in the mistaken belief that the *status* of the plaintiff imposed upon him a duty toward the defendant. It seems clear, upon principle, that one who believes himself to be a slave whereas in fact he has been emancipated, or one who believes himself to have been legally apprenticed whereas the apprenticeship is void, or one who believes himself or herself to be the legal husband or wife of another whereas by reason of the previous marriage of the latter the relation of husband and wife does not exist, should be allowed to recover the value of any services rendered or other benefit conferred in performance of the duties of such supposed status. The authorities are divided.[4] In many of

[1] City of Indianapolis *v.* McAvoy, 1882, 86 Ind. 587; City of Indianapolis *v.* Patterson, 1887, 112 Ind. 344; 14 N. E. 551, (*cf.* De Pauw Plate Glass Co. *v.* City of Alexandria, 1898, 152 Ind. 443; 52 N. E. 608); George's Creek C. & I. Co. *v.* County Commrs., 1882, 59 Md. 255; Betz *v.* City of New York, 1907, 103 N. Y. Supp. 886, (aff. 193 N. Y. 625).

[2] Wheeler *v.* Board of County Commrs., 1902, 87 Minn. 243; 91 N. W. 890.

[3] Pitcher *v.* Turin Plank Road Co., 1851, 10 Barb. (N. Y. Sup. Ct.) 436. Although the court, in this case, endeavors to show that the mistake was one of fact rather than of law, its argument is not convincing. As to money paid under a mistake of law, see *ante*, § 35 *et seq.*

[4] *Slave: recovery allowed:* Kinney *v.* Cook, 1841, 4 Ill. 232; Hickam *v.* Hickam, 1891, 46 Mo. App. 496; Negro Peter *v.* Steel, 1801, 3 Yeats (Pa.) 250; Urie *v.* Johnston, 1831, 3 Penr. & W. (Pa.) 212. *Contra:* Negro Franklin *v.* Waters, 1849, 8 Gill (Md.) 322. And see Boardman *v.* Ward, 1889, 40 Minn. 399; 42 N. W. 202; 12 Am. St. Rep. 749.

Apprentice: See Burrows *v.* Ward, 1886, 15 R. I. 346; 5 Atl. 500, which indicates that recovery would be denied.

the cases, the plaintiff's ignorance of his true status was the result of the defendant's fraudulent representations, and the plaintiff claimed the right to waive the tort and sue in assumpsit — a question separately treated in another chapter (*post*, §§ 282, 285, 286).

In measuring the recovery in a case of mistake as to status the value of any benefit conferred upon the plaintiff by the defendant — as board, lodging, clothing, or instruction — must be deducted from the value of the services rendered by the plaintiff. For to the extent that the benefit has been paid for, its retention is not unjust. A consideration paid to the father of a supposed apprentice, or to the former master of a supposed slave, must be deducted for the same reason. And if such consideration is equivalent to the value of the services rendered by the plaintiff, no recovery should be allowed.[1]

§ 185. **Misreliance on duty of executor or administrator.** — Money paid by an executor under a mistake as to the terms of his testator's will,[2] or in ignorance of the fact that the payee's legacy had lapsed,[3] may be recovered.

Although the rule was otherwise at the English common law,[4] it is held by the weight of American authority that money paid by an executor or administrator to a creditor in excess of

Husband or wife: recovery allowed: Fox *v.* Dawson, 1820, 8 Mart. (La.) 94; Higgins *v.* Breen, 1845, 9 Mo. 497. *Contra:* Payne's Appeal, 1895, 65 Conn. 397; 32 Atl. 948; 33 L. R. A. 418; 48 Am. St. Rep. 215; Cooper *v.* Cooper, 1888, 147 Mass. 370; 17 N. E. 892; 9 Am. St. Rep. 721.

If the plaintiff, when he entered into the marriage, knew that the only evidence of the death of the former husband of the defendant was his long-continued absence from home, he assumed the risk that the marriage was void and cannot be said to have performed the duties of a husband in reliance upon its validity. See Ogden *v.* McHugh, 1897, 167 Mass. 276; 45 N. E. 731; 57 Am. St. Rep. 456.

[1] Urie *v.* Johnston, 1831, 3 Penr. & W. (Pa.) 212.

[2] Northrop's Extrs. *v.* Graves, 1849, 19 Conn. 548; 50 Am. Dec. 264.

[3] Phetteplace *v.* Bucklin, 1893, 18 R. I. 297; 27 Atl. 211. *Cf.* Phillips Extr. *v.* McConica, 1898, 59 Ohio St. 1; 51 N. E. 445; 69 Am. St. Rep. 753, where the mistake was one of law and relief was for that reason denied.

[4] See Walker *v.* Hill, 1821, 17 Mass. 380, 383, where the reason for the English rule is explained.

his *pro rata* share, under the mistaken belief that the estate is solvent, may be recovered.[1]

An overpayment to a legatee or distributee may be recovered, in England, only when made under the compulsion of a suit, or when the executor or administrator is subsequently obliged to pay debts of which he had no notice when the payment sought to be recovered was made.[2] In the United States, the rule is not so strict, and while in some jurisdictions the executor or administrator must satisfy the court that he acted prudently in making the payment,[3] in others, and more prop-

[1] Mansfield *v.* Lynch, 1890, 59 Conn. 320; 22 Atl. 313; 12 L. R. A. 285; Wolf *v.* Beaird, 1888, 123 Ill. 585; 15 N. E. 161; 5 Am. St. Rep. 565; East *v.* Ferguson, 1877, 59 Ind. 169; Tarplee *v.* Capp, 1900, 25 Ind. App. 56; 56 N. E. 270; Morris *v.* Porter, 1895, 87 Me. 510; 33 Atl. 15; Walker *v.* Hill, 1821, 17 Mass. 380; Heard *v.* Drake, 1855, 4 Gray (Mass.) 514; Rogers *v.* Weaver, 1832, 5 Ohio 536; Thorson *v.* Hooper, 1910, 57 Or. 75, 79; 109 Pac. 388. *Contra:* Lawson's Admrs. *v.* Hansborough, 1849, 10 B. Mon. (49 Ky.) 147; (*cf.* Story *v.* Story, 1901, 22 Ky. Law Rep. 1869; 62 S. W. 865); Carson *v.* McFarland, 1828, 2 Rawle (Pa.) 118; 19 Am. Dec. 627. The former case rests partly upon the ground that the plaintiffs were negligent, and partly upon the construction of a Kentucky statute; the latter chiefly upon the theory that the defendant had received only what was honestly due him and was therefore not bound in conscience to make restitution. As to the plaintiff's negligence, it is elsewhere shown that upon principle and by the weight of authority the negligence of the plaintiff is not a defense. (See *ante*, § 15.) To the claim that the retention of the benefit is not against conscience because the debt was honestly due, an answer is found in Mansfield *v.* Lynch, *supra*, where the court said (p. 328): "In one sense it is true that the estate owed the defendant the amount overpaid, but it is not, in any legal or moral sense true that it was the duty of the administrator to pay, or the right of the defendant to receive, her claim in full from the then known assets of the estate. Her right was only to receive her *pro rata* share with the other general creditors, and the unpaid balance still remained a claim in her favor against the estate. If she gets more than this, it must be at the expense of the other general creditors or of the administrator. She did in fact get more than she was entitled to solely in consequence of an honest mistake. . . . Can it then with reason be said she has 'a right, in good conscience,' to retain money which rightfully belongs to the estate, to which she is neither morally nor legally entitled, and which she obtained solely in consequence of an honest mistake which wrought her no harm whatever?"

[2] See Williams, "Executors," p. 1312 and cases there cited.

[3] Clifton *v.* Clifton, 1907, 54 Fla. 535; 45 So. 458, (allowing relief in equity); Donnell *v.* Cooke, 1869, 63 N. C. 227; Lyle *v.* Siler, 1889, 103

erly (see *ante*, § 15), an honest mistake as to the condition of the estate seems to be regarded as a sufficient basis for relief.[1] Where the mistake is not as to the condition of the estate, but as to the law, relief will not be afforded,[2] except in those jurisdictions where money paid under a mistake of law may be recovered.[3]

N. C. 261; 9 S. E. 491, 492; McEndree *v.* Morgan, 1888, 31 W. Va. 521; 8 S. E. 285. And see Harris *v.* White, 1819, 5 N. J. L. 422.

[1] Alexander *v.* Fisher, 1850, 18 Ala. 374; Smith *v.* Smith, 1881, 76 Ind. 236; Stokes *v.* Goodykoontz, 1890, 126 Ind. 535; 26 N. E. 391; Buchanan *v.* Pue, 1847, 6 Gill (Md.) 112; Gallego's Extrs. *v.* Attorney General, 1832, 3 Leigh (Va.) 450, 488; 24 Am. Dec. 650; Lewis *v.* Overby, 1879, 31 Grat. (Va.) 601, 622; (but see Davis *v.* Newman, 1844, 2 Rob. (Va.) 664; 40 Am. Dec. 764); McClung *v.* Sieg, 1902, 54 W. Va. 467; 46 S. E. 210; 66 L. R. A. 884. In this last case the plaintiff had remitted the assets to the domiciliary administrator in Virginia, who in turn had partially distributed the estate. Having been forced to pay a judgment subsequently obtained by a West Virginia creditor, the plaintiff was allowed in equity to recover from a Virginia distributee. For a criticism of this decision, see 17 Harv. Law Rev. 422.

[2] Phillips Extr. *v.* McConica, 1898, 59 Ohio St. 1; 51 N. E. 445; 69 Am. St. Rep. 753; Shriver *v.* Garrison, 1887, 30 W. Va. 456; 4 S. E. 660.

[3] Northrop's Extrs. *v.* Graves, 1849, 19 Conn. 548; 50 Am. Dec. 264; Culbreath *v.* Culbreath, 1849, 7 Ga. 64; 50 Am. Dec. 375.

CHAPTER XIII

MISRELIANCE ON OWNERSHIP OF PROPERTY

§ 186. In general.
§ 187. (I) Improvement of real property.
§ 188. Same: Upon principle.
§ 189. Same: Measure of recovery.
§ 190. (II) Improvement of personalty.

§ 186. **In general.** — Although cases of mistake as to the ownership of property, real or personal, are neither so frequent nor so various as those of mistake as to contractual rights or duties, they involve the same general principles (*ante*, § 10 *et seq.*). Accordingly, one who by the expenditure of money or labor upon property which he mistakenly believes to be his own, confers a benefit upon the real owner of the property, should be allowed to enforce restitution. It will be seen, however, that as a result of supposed considerations of policy affirmative relief at law is generally denied.

§ 187. (I) **Improvement of real property.** — It was the settled doctrine of the common law that an occupant of land makes improvements thereon at his peril. The reason given for this harsh doctrine was one of policy, *viz.* that any other rule would encourage carelessness in the examination of titles. The result was that an occupant who made improvements in the honest but mistaken belief that he was the owner of the property could neither enforce restitution in value for the benefit conferred upon the real owner, in an affirmative action against such owner, nor require such restitution as a condition of his ejectment.[1]

[1] Ford *v.* Holton, 1855, 5 Cal. 319, (ejectment); Westerfield *v.* Williams, 1877, 59 Ind. 221, (claim filed against estate; no recovery outside statutory provisions); Webster *v.* Stewart, 1858, 6 Iowa 401, (independent action for value; no recovery outside statutory provisions);

The courts of equity, applying the maxim that he who seeks equity must do equity, departed from the common law rule to the extent of holding that where the real owner of the property seeks the assistance of equity in the establishment of his rights, he will be compelled to make restitution for improvements made by a *bona fide* occupant.[1] And in some cases it has been held that even if the *bona fide* occupant is ejected at law, he is entitled to affirmative relief in equity for the benefit conferred upon the owner by the improvements.[2]

Gregg *v.* Patterson, 1844, 9 Watts & Serg. (Pa.) 197, 209, (ejectment); Putnam *v.* Tyler, 1888, 117 Pa. St. 570, 588; 12 Atl. 43, (ejectment). And see McDonald *v.* Rankin, 1909, 92 Ark. 173; 122 S. W. 88, 91; Parsons *v.* Moses, 1864, 16 Iowa 440.

[1] Bright *v.* Boyd, 1841, 1 Story (U. S. C. C.) 478, 494; Fed. Cas., No. 1875; Gordon, Rankin & Co. *v.* Tweedy, 1883, 74 Ala. 232; 49 Am. Rep. 813; Ebelmesser *v.* Ebelmesser, 1881, 99 Ill. 541; Wakefield *v.* Van Tassell, 1905, 218 Ill. 572; 75 N. E. 1058; Pugh *v.* Bell, 1825, 2 T. B. Mon. (18 Ky.) 125; 15 Am. Dec. 142; Jones *v.* Jones, 1846, 4 Gill (Md.) 87, 102; McLaughlin *v.* Barnum, 1869, 31 Md. 425, 453; Bacon *v.* Cottrell, 1868, 13 Minn. 194; Smith *v.* Drake, 1873, 23 N. J. Eq. 302; Putnam *v.* Ritchie, 1837, 6 Paige (N. Y. Ch.) 390; Thomas *v.* Evans, 1887, 105 N. Y. 601; 12 N. E. 571; 59 Am. Rep. 519, (action to vacate and annul a deed); Bomberger *v.* Turner, 1862, 13 Ohio St. 263; 82 Am. Dec. 438, (bill to set aside a sale of land as fraudulent against creditors); Skiles's Appeal, 1885, 110 Pa. St. 248; 20 Atl. 722, (bill to set aside gratuitous conveyance by an insolvent decedent); Van Zandt *v.* Brantley, 1897, 16 Tex. Civ. App. 420; 42 S. W. 617, (action to rescind a sale); Southall *v.* M'Keand, 1794, 1 Wash. (Va.) 336, 339; Williamson *v.* Jones, 1897, 43 W. Va. 562; 27 S. E. 411; 38 L. R. A. 694; 64 Am. St. Rep. 891. See Dellet *v.* Whitner, 1839, Cheves Eq. (S. C.) 213, 228.

[2] Bright *v.* Boyd, 1841, 1 Story (U. S. C. C.) 478; Fed. Cas., No. 1, 875 (*cf.* 2 Story's "Equity Jurisprudence," § 1238); Parker *v.* Stevens, 1820, 3 A. K. Marsh. (10 Ky.) 197, 202; Thomas *v.* Thomas' Extr. 1855, 16 B. Mon. (55 Ky.) 420; Quynn *v.* Staines, 1793, 3 Harr. & McH. (Md.) 128, (injunction to require purchaser to withhold purchase money sufficient to pay for improvements); Union Hall Ass'n *v.* Morrison, 1873, 39 Md. 281; Hatcher *v.* Briggs, 1876, 6 Or. 31, (cross bill in an action of ejectment). And see Vallé's Heirs *v.* Fleming's Heirs, 1859, 29 Mo. 152; 77 Am. Dec. 557, (rule applied to an occupant whose purchase money has been applied in the extinguishment of a valid mortgage); Wilie *v.* Brooks, 1871, 3 Morris (45 Miss.) 542, 549, (occupants had brought owners into court on a bill to restrain an action at law on ground of estoppel).

Contra: Armstrong *v.* Ashley, 1907, 204 U. S. 272, 285; 27 S. Ct.

The courts of law, influenced probably by the attitude of equity, have slightly modified the old common law rule, and hold that where the real owner brings an action for mesne profits, the *bona fide* occupant may set off or recoup the value of his improvements to the extent of the rents and profits demanded.[1] They still refuse, however, to give the occupant affirmative relief or even to make restitution a condition of ejectment.[2]

That the severe doctrine of the common law does not commend itself is evidenced by the fact that in most States statutes have been enacted securing to the *bona fide* occupant the value of improvements made by him and the amount of taxes paid by him, over and above the amount due for use and occupa-

270; Ellett *v.* Wade, 1872, 47 Ala. 456, 466; Anderson *v.* Reid, 1899, 14 App. D. C. 54; Williams *v.* Vanderbilt, 1893, 145 Ill. 238; 34 N. E. 476; 21 L. R. A. 489; 36 Am. St. Rep. 486; Putnam *v.* Ritchie, 1837, 6 Paige (N. Y. Ch.) 390; Winthrop's Admrs. *v.* Huntington, 1828, 3 Ohio 327; 17 Am. Dec. 601; Fricke *v.* Safe Deposit, etc., Co., 1897, 183 Pa. St. 271; 38 Atl. 601. And see Graeme *v.* Cullen, 1873, 23 Gratt. (Va.) 266, 296.

[1] Hylton *v.* Brown, 1808, 2 Wash. (U. S. C. C.) 165; Fed. Cas., No. 6983; Kerr *v.* Nicholas, 1889, 88 Ala. 346; 6 So. 698; Jackson *v.* Loomis, 1825, 4 Cow. (N. Y.) 168; 15 Am. Dec. 347; Ege *v.* Kille, 1877, 84 Pa. St. 333, 340. And see Searl *v.* School Dist., 1890, 133 U. S. 553; 10 S. Ct. 374; Huse *v.* Den, 1890, 85 Cal. 390, 401; 24 Pac. 790; 20 Am. St. Rep. 232; Doe *d.* Scott *v.* Alexander, 1861, 2 Houst. (Del.) 321, (but occupant cannot recover for improvements made by his landlord); Wakefield *v.* Van Tassell, 1905, 218 Ill. 572; 75 N. E. 1058; Parsons *v.* Moses, 1864, 16 Ia. 440, 445; Tongue *v.* Nutwell, 1869, 31 Md. 302, 309; Carter *v.* Brown, 1892, 35 Neb. 670, 675; 53 N. W. 580; Patterson *v.* Reardon, 1850, 7 U. C. Q. B. 326; Effinger *v.* Hall, 1885, 81 Va. 94, 101.

In Jackson *v.* Loomis, *supra*, the court said (p. 172): "There is certainly no reason, in general, why the owner of land should be compelled to pay for improvements which he neither directed nor desired, as a condition on which he is to gain possession of his property. But when an occupant has taken possession under a *bona fide* purchase, and made permanent improvements, it is very hard for him to lose both land and improvements. If the plaintiff is not content with acquiring possession of his property in an improved condition, after he has neglected to assert his title for a number of years, it is certainly equitable that the defendant should be allowed the value of his improvements, made in good faith, to the extent of the rents and profits claimed."

[2] See cases cited note 1, page 299.

tion.[1] The policy which led to these enactments is clearly stated in a case arising under the Connecticut statute:

Griswold v. *Bragg*, 1880, 48 Fed. 519; 18 Blatch. (U. S. C. C.) 202; SHIPMAN, J. (p. 520): "The statute practically impresses upon the land of a successful plaintiff in ejectment a lien for the excess, above the amount due for use and occupation, of the present value of the improvements which have been placed on the land, before the commencement of the action, by a defendant or his ancestors or grantors, in good faith, and in the belief that he or they had an absolute title to the land in question, and forbids occupancy by the plaintiff until the lien is paid. There is a natural equity which rebels at the idea that a *bona fide* occupant and reputed owner of land in a newly settled country, where unimproved land is of small value, or where skill in conveyancing has not been attained, or where surveys have been uncertain or inaccurate, should lose the benefit of the labor and money which he had expended in the erroneous belief that his title was absolute and perfect. While it is true that improvements and permanent buildings upon land belong to the owner, yet, in a comparatively newly organized state, where titles are necessarily more uncertain than they are in England, there is an instinctive conviction that justice requires that the possessor under a defective title should have recompense for the improvements which have been made in good faith upon the land of another. The maxim, often repeated in the decisions upon this subject, *nemo debet locupletari ex alterius incommodo*, tersely expresses the antagonism against the enrichment of one out of the honest mistake, and to the ruin, of another. It is obvious that this statutory equity is not without occasional

[1] See the following cases in which statutes are referred to: Southern Cotton Oil Co. *v.* Henshaw, 1890, 89 Ala. 448; 7 So. 760; McDonald *v.* Rankin, 1909, 92 Ark. 173; 122 S. W. 88; O'Brien *v.* Flint, 1902, 74 Conn. 502; 51 Atl. 547; Hicks *v.* Webb, 1906, 127 Ga. 170; 56 S. E. 307; Wakefield *v.* Van Tassell, 1905, 218 Ill. 572; 75 N. E. 1058; Parsons *v.* Moses, 1864, 16 Ia. 440; Pass *v.* McLendon, 1885, 62 Miss. 580; Bellows *v.* McCartee, 1846, 20 N. H. 515; Neeld *v.* Cunningham, 1907, 216 Pa. St. 523, 527; 65 Atl. 1095; Salinas *v.* Aultman & Co., 1895, 45 S. C. 283; 22 S. E. 889; Parker *v.* Vinson, 1899, 11 S. D. 381; 77 N. W. 1023; Rutland R. Co. *v.* Chaffee, 1900, 72 Vt. 404; 48 Atl. 700; Johnson *v.* Ingram, 1911, 63 Wash. 554; 115 Pac. 1073; Zwietusch *v.* Watkins, 1884, 61 Wis. 615; 21 N. W. 821.

hardships. The true owner may be forced to sell his land against his will, and may sometimes be placed too much in the power of capital, but a carefully regulated and guarded statute should ordinarily be the means of doing exact justice to the owner."

Their constitutionality has been often challenged, but in general has been upheld.[1]

§ 188. **Same: Upon principle.** — Whether or not a recovery should be allowed in these cases is a question of some difficulty. The fear of the common law courts that to permit a recovery would be to place a premium upon heedlessness is probably groundless. Certainly, the doctrine of equity has not brought disaster. But a more serious objection to recovery (and one that has not been given the attention it deserves) is the hardship that must sometimes result to the owner if he is compelled to pay for improvements which, though they may enhance the value of his property, he does not want. The owner should certainly have an election either to pay for the improvements or to sell the land to the improver at its fair market value.[2] And with this election, the hardship to the owner would probably be less, in practically every case, than that which would result to the innocent occupant if he were denied relief.

[1] Griswold *v.* Bragg, 1880, 48 Fed. 519, 522; 18 Blatch. (U. S. C. C.) 202; Fee *v.* Cowdry, 1885, 45 Ark. 410, 413; 55 Am. Rep. 560; Ross *v.* Irving, 1852, 14 Ill. 171; Armstrong *v.* Jackson *d.* Elliott, 1825, 1 Blackf. (Ind.) 374; Childs *v.* Shower, 1865, 18 Ia. 261, (holding an amendatory act giving defendant personal judgment unconstitutional); Claypoole *v.* King, 1879, 21 Kan. 602; Madland *v.* Beuland, 1878, 24 Minn. 372; McCoy *v.* Grandy, 1854, 3 Ohio St. 463, (holding, however, that a provision giving defendant option to pay value of land and take title is unconstitutional). And see Society, etc., *v.* Wheeler, 1814, 2 Gall. (U. S. C. C.) 105, 137; Fed. Cas., No. 13,156; Billings *v.* Hall, 1857, 7 Cal. 1, (upholding constitutionality of acts in general but holding particular act, which failed to distinguish between a *bona fide* occupant and a tortious one, unconstitutional); Newton *v.* Thornton, 1885, 3 N. Mex. 189; 5 Pac. 257, (holding act cannot affect landowner's right to improvements made before passage of act). See also Cooley, "Constitutional Limitations" (7th ed.), pp. 550–553 and cases cited.

[2] See decree in Union Hall Ass'n *v.* Morrison, 1873, 39 Md. 281, 298.

§ 189. **Same: Measure of recovery.** — Since in these cases the improvement is not made at the instance of the owner of the land, it cannot fairly be adjudged that he is benefited by the services rendered, money expended, and materials furnished, unless the market value of his property is enhanced (see *ante*, §§ 8, 107). The limit of recovery, therefore, whether at law or in equity, should be the extent of the enhancement of the value of the property — not the value of the occupant's services nor the cost of the improvement.[1] This is recognized in the Betterment Acts to which reference has been made (*ante*, § 187).

§ 190. (II) **Improvement of personalty.** — With the same policy of discouraging heedlessness that led to the denial of relief in cases of the improvement of land, the common law has refused to permit one who, in the mistaken belief that he was the owner, has enhanced the value of another's personal property by labor expended in its improvement or transportation, to recover the value of the benefit resulting to the real owner:

Isle Royale Mining Co. v. *Hertin*, 1877, 37 Mich. 332; 26 Am. Rep. 520: Assumpsit for value of labor and expenses in cutting, splitting, piling, and hauling wood. The parties were owners of adjoining tracts of timbered land, and the plaintiffs, in consequence of a mistake respecting the actual location, went upon the mining company's lands and cut a quantity of wood, which they hauled and piled on the bank of Portage Lake. Subsequently, the defendant took possession of the wood and sold it. COOLEY, C.J. (p. 337): "Nothing could more

[1] Greer *v.* Vaughan, 1910, 96 Ark. 524; 132 S. W. 456, 459, (*cf.* Reynolds *v.* Reynolds, 1892, 55 Ark. 369, 374; 18 S. W. 377); Adams *v.* Kells, 1909, 79 Kan. 564; 100 Pac. 506; Proctor *v.* Smith, 1871, 8 Bush (71 Ky.) 81, (*cf.* Patrick *v.* Woods, 1813, 3 Bibb (6 Ky.) 29; Hall *v.* Brummal, 1869, 7 Bush (70 Ky.) 43, where under exceptional circumstances the occupant was allowed *cost* of improvements); Ebelmesser *v.* Ebelmesser, 1881, 99 Ill. 541, 549; Union Hall Ass'n *v.* Morrison, 1873, 39 Md. 281; Petit *v.* Flint, etc., R. Co., 1899, 119 Mich. 492; 78 N. W. 554; 75 Am. St. Rep. 417; Hicks *v.* Blakeman, 1896, 74 Miss. 459; 21 So. 7, 400; Sires *v.* Clark, 1908, 132 Mo. App. 537; 112 S. W. 526; Lothrop *v.* Michaelson, 1895, 44 Neb. 633, 639; 63 N. W. 28; Wendell *v.* Moulton, 1852, 26 N. H. 41, 66; Fain *v.* Nelms, 1908, 113 S. W. 1002, (Tex. Civ. App.); Bacon *v.* Thornton, 1897, 16 Utah 138; 51 Pac. 153.

encourage carelessness than the acceptance of the principle that one who by mistake performs labor upon the property of another should lose nothing by his error, but should have a claim upon the owner for remuneration. Why should one be vigilant and careful of the rights of others if such were the law? Whether mistaken or not is all the same to him, for in either case he has employment and receives his remuneration; while the inconveniences, if any, are left to rest with the innocent owner. Such a doctrine offers a premium to heedlessness and blunders, and a temptation by false evidence to give an intentional trespass the appearance of an innocent mistake.

"A case could seldom arise in which the claim to compensation could be more favorably presented by the facts than it is in this; since it is highly probable that the defendant would suffer neither hardship nor inconvenience if compelled to pay the plaintiffs for their labor. But a general principle is to be tested, not by its operation in an individual case, but by its general workings. If a mechanic employed to alter one man's dwelling house, shall by mistake go to another which happens to be unoccupied, and before his mistake is discovered, at a large expenditure of labor shall thoroughly overhaul and change it, will it be said that the owner, who did not desire his house disturbed, must either abandon it altogether, or if he takes possession, must pay for labor expended upon it which he neither contracted for, desired nor consented to? And if so, what bounds can be prescribed to which the application of this doctrine can be limited? The man who by mistake carries off the property of another will next be demanding payment for the transportation; and the only person reasonably secure against demands he never assented to create, will be the person who, possessing nothing, is thereby protected against anything being accidentally improved by another at his cost and to his ruin." [1]

This rule seems inconsistent with that governing the measure of damages in conversion. According to the weight of modern authority, while a willful converter may be required to answer for the value of the property as enhanced by improvements

[1] *Accord:* Gaskins *v.* Davis, 1894, 115 N. C. 85; 20 S. E. 188; 25 L. R. A. 813; 44 Am. St. Rep. 439.

which he has made upon it, one who converts goods by mistake is liable only to the extent of the value of the goods at the time and place of the original conversion.[1] According to some of the authorities, this means simply that against an innocent converter exemplary or punitive damages may not be recovered. But in the case of *Trustees of Dartmouth College* v. *International Paper Company*,[2] Judge LOWELL points out that exemplary damages do not depend upon the improvement of the thing converted but upon the bad faith of the converter, and that consequently they would be the same whether the goods were enhanced in value or totally destroyed. The true basis of the rule, he contends, is that a converter who in good faith improves another's goods acquires a right to an allowance

[1] Livingstone *v.* Rawyards Coal Co., 1880, 5 App. Cas. 25, (coal); Wooden-Ware Co. *v.* United States, 1882, 106 U. S. 432; 1 S. Ct. 398, (timber); United States *v.* Northern Pac. R. Co., 1895, 67 Fed. 890, (U. S. C. C., Or.), (value of standing timber); White *v.* Yawkey, 1896, 108 Ala. 270; 19 So. 360; 42 L. R. A. 199; 54 Am. St. Rep. 159, (value immediately after severance); Eaton *v.* Langley, 1898, 65 Ark. 448; 47 S. W. 123; 12 L. R. A. 474, (value in new form, less labor, etc., not exceeding increase in value); Maye *v.* Tappan, 1863, 23 Cal. 306, (value of gold ore, less expense of extracting); Winchester *v.* Craig, 1876, 33 Mich. 205, (value of timber where taken or market value less expense of preparation, and transportation); Gates *v.* Rifle Boom Co., 8188, 70 Mich. 309, 316; 38 N. W. 245, (value of standing timber); King *v.* Merriman, 1887, 38 Minn. 47, 54; 35 N. W. 570, (value of standing timber); Beede *v.* Lamprey, 1888, 64 N. H. 510; 15 Atl. 133; 10 Am. St. Rep. 426, (value of timber immediately after severance); Forsyth *v.* Wells, 1861, 41 Pa. St. 291; 80 Am. Dec. 617, (value of coal in place); Herdic *v.* Young, 1867, 55 Pa. St. 176, 179; 93 Am. Dec. 739, (timber); (*cf.* Lyon *v.* Gormley, 1866, 53 Pa. St. 261, 265); Single *v.* Schneider, 1869, 24 Wis. 299, 303, 1872, 30 Wis. 570, 574, (value of standing timber).

The rule is the same where the innocent converter sufficiently changes the nature or enhances the value of the goods to acquire title to them by accession. Lewis *v.* Courtright, 1889, 77 Ia. 190; 41 N. W. 615, (hay); Baker *v.* Meisch, 1890, 29 Neb. 227; 45 N. W. 685, (brick); Carpenter *v.* Lingenfelter, 1894, 42 Neb. 728; 60 N. W. 1022; 32 L. R. A. 422, (hay); Hyde *v.* Cookson, 1855, 21 Barb. (N. Y. Sup. Ct.) 92, (hides made into leather); Louis Werner Stave Co. *v.* Pickering, 1909, 55 Tex. Civ. App. 632; 119 S. W. 333, (timber converted into staves).

[2] 1904, 132 Fed. 92 (C. C., N. H.).

of the cost of his improvements, not to exceed the consequent enhancement in value of the property converted.

It is submitted that if an innocent converter is entitled to an allowance when sued for conversion, he ought to be given affirmative relief when the owner retakes the improved property. The denial of relief in the latter case is not only unjust but against public policy, for as Judge LOWELL says,[1] " if the plaintiff can hold his improved and transmuted property which he has physically retaken without allowance to the defendant, while in an action he can recover but a small part of the value of this improved property, the plaintiff will be disposed to resort to physical recovery without the aid of the law, even if force and a breach of the peace be the result." This consideration clearly outweighs the supposed danger of encouraging heedlessness and perjury to which Judge COOLEY referred in *Isle Royale Mining Company* v. *Hertin*.[2] And if it be contended that to allow the converter to recover would be to compel the owner, in many cases, to pay for improvements not desired by him, the answer is that he may elect, in every case, to let the converter keep the property and to recover the damages actually suffered as a result of its conversion.

[1] Trustees of Dartmouth College *v.* International Paper Co., 1904, 132 Fed. 92, 97 (C. C., N. H.).

[2] 1877, 37 Mich. 332; 26 Am. Rep. 520.

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PART II

BENEFITS CONFERRED THROUGH DUTIFUL INTERVENTION IN ANOTHER'S AFFAIRS

CHAPTER XIV

GENERAL PRINCIPLES AND SUNDRY INSTANCES OF THE OBLIGATION

§ 191. In general.
§ 192. (I) Dutiful intervention.
§ 193. (1) The discharge of another's obligation.
§ 194. (*a*) Actual performance a matter of public concern.
§ 195. (*b*) Default of the obligor.
§ 196. (*c*) The plaintiff an appropriate intervenor.
§ 197. (2) The preservation of life or property.
§ 198. (II) The receipt of benefit by defendant.
§ 199. (III) Retention of benefit inequitable: Gratuitous intervention.
§ 200. (IV) Sundry instances of the obligation.
§ 201. (1) Preservation of life: Services in emergency.
§ 202. (2) Necessaries furnished infant or insane person.
§ 203. (3) Necessaries furnished wife or children.
§ 204. (4) Necessaries furnished pauper.
§ 205. (5) Burial of the dead.
§ 206. (6) Preservation of property: Maritime salvage.
§ 207. Same: Salvage at the common law.
§ 208. (7) Repairs by a co-tenant.
§ 209. (8) Performance of another's contractual duty.
§ 210. (9) Performance of another's statutory duty to repair roads.

§ 191. **In general.** — One of the principal classes of quasi contractual obligations in the Roman law was *Negotiorum Gestio*, a sort of "spontaneous agency" or justifiable intervention in another's affairs in his absence and without his authority. The doctrine was expounded in the Institutes of Justinian as follows:

"Thus, if one man has managed the business of another during the latter's absence, each can sue the other by the action on uncommissioned agency; the direct action being available

to him whose business was managed, the contrary action to him who managed it. It is clear that these actions cannot properly be said to originate in a contract, for their peculiarity is that they lie only where one man has come forward and managed the business of another without having received any commission so to do, and that other is thereby laid under legal obligation even though he knows nothing of what has taken place. The reason of this is the general convenience; otherwise people might be summoned away by some sudden event of pressing importance, and without commissioning any one to look after and manage their affairs, the result of which would be that during their absence those affairs would be entirely neglected: and of course no one would be likely to attend to them if he were to have no action for the recovery of any outlay he might have incurred in so doing. Conversely, as the uncommissioned agent, if his management is good, lays his principal under a legal obligation, so too he is himself answerable to the latter for an account of his management; and herein he must show that he has satisfied the highest standard of carefulness, for to have displayed such carefulness as he is wont to exercise in his own affairs is not enough, if only a more diligent person could have managed the business better." [1]

Although retained in the modern Continental codes [2] and in the law of Louisiana,[3] this doctrine has never been adopted in its entirety by the common law. There are various cases, however, often regarded as diverse in principle, in which something like *negotiorum gestio* is recognized. The following is believed to be a safe generalization: One who, through a dutiful intervention in another's affairs, *i.e.* an intervention required by a sense of duty, though not by law, confers a benefit for which the recipient ought in justice to pay, is entitled to compensation.

[1] Book III, Title XXVII, *De Obligationibus Quasi ex Contractu*, as translated in Scott, "Cases on Quasi-Contracts," p. 1.

[2] See French Civil Code (English translation by Blackwood Wright), arts. 1372–75; Italian Civil Code (French translation by Prudhomme), arts. 1141–44; Spanish Civil Code (Falcon's ed.), arts. 1888–94; 2 Windscheid, "Pandektenrecht," §§ 430, 431.

[3] Martin's Revised Civil Code, arts. 2295–99; Police Jury *v.* Hampton, 1827, 5 Mart. (N. S.) 389.

The essential elements of the obligation will first be considered upon principle, and then sundry instances in which it arises will be examined.

§ 192. (I) **Dutiful intervention.** — Broadly speaking, the ways in which one may intervene in another's affairs to the latter's advantage are multifarious. Acts of beneficial intervention which may result in quasi contractual obligation, however, fall within the following classes:

(1) The discharge of another's legal obligation.

(2) The preservation of another's life or property.

Under what circumstances may intervention for either of these purposes be said to be a dutiful intervention?

§ 193. (1) **The discharge of another's obligation.** — The performance of another's legal obligation may be regarded as dutiful, if it appears:

(*a*) That the obligation is of such a nature that actual and prompt performance of it is of grave public concern.

(*b*) That the person upon whom the obligation rests has failed or refused, with knowledge of the facts, to perform it; or that it reasonably appears that it is impossible for him to perform it.

(*c*) That he who intervenes is under the circumstances an appropriate person.

§ 194. (*a*) **Actual performance a matter of public concern.** — Professor Keener says that the obligation must be one which is imposed "because of the interest which the public has in its performance." [1] This seems too broad, since it includes, apparently, any obligation the breach of which constitutes a criminal offense. If, for instance, every citizen were required by the tax law to file a statement of all property owned by him and it were made a misdemeanor to neglect so to do, the public would be interested, in a sense, in the performance of this obligation; yet it is improbable that a person who performed the duty for another without authority would under any circumstances be permitted to recover the value of his service. The true limitation, it is believed, is that the obliga-

[1] "Quasi-Contracts," p. 341.

tion must be such that actual and prompt performance of it as distinguished from the payment of a penalty for non-performance, is a matter of grave public concern. The obligation of a man to support his wife is perhaps the best example that can be given. The moral sense of the community requires that such an obligation be actually performed; the imposition of a penalty for its non-performance is not enough. If, therefore, the person upon whom the obligation rests fails to perform it, intervention is clearly a duty.

§ 195. (*b*) **Default of the obligor.** — The performance of another person's obligation is clearly not required, so long as there is a probability that the obligor will perform it with reasonable promptness himself. It follows that one who seeks restitution for a benefit so conferred must show, ordinarily, that the defendant had notice or knowledge of the facts giving rise to his obligation and either refused to perform it or failed to perform it within a reasonable time.[1] But if it appears that by reason of the urgency of the duty or the distance of the defendant, prompt performance by him was impossible, notice or knowledge of the facts need not be shown. Thus, a physician suing a father for services in attending a child, which services were not contracted for by the father, should be required to establish either that the father was notified of the child's illness and refused or failed to employ a physician, or that because of the extremity of the child's condition or the inaccessibility of the father, notice would have been of no avail.[2]

§ 196. (*c*) **The plaintiff an appropriate intervenor.** — The circumstances of a case not infrequently point to a particular person as the one who may with propriety intervene. Thus,

[1] Manhattan Fire Alarm Co. *v.* Weber, 1898, 22 Misc. R. 729; 50 N. Y. Supp. 42. Action against the lessee of a theater, for the value of the maintenance of a fire alarm system installed for a former lessee. "Moreover," said the court, "the record fails to disclose whether or not any other fire alarm system was provided by the defendants during the period in question."

[2] See Dunbar *v.* Williams, 1813, 10 Johns. (N. Y.) 249, (medical attendance on a slave).

in a case requiring the payment of funeral expenses, a relative, friend, or neighbor may more appropriately intervene than a stranger (*post*, § 205). So, where the law required a theater lessee to maintain a fire alarm system and clothed certain public officers with ample power to compel him to discharge the duty, it was held inappropriate for a company engaged in the business of installing and maintaining fire alarm systems to intervene.[1] One who, in disregard of the obvious proprieties, pushes in ahead of a more suitable person, is an officious meddler and is not entitled to compensation.[2]

§ 197. (2) **The preservation of life or property.** — The preservation of another's life is always dutiful. The preservation of another's property may be regarded as dutiful if it appears that the danger to the property is so imminent that notice probably cannot be given to the owner in time to enable him to take the necessary steps to preserve it, or that probably he will be unable, without assistance, to preserve it. The fact that the owner *neglects* or is *unwilling* to take the necessary steps to protect his property is not enough.[3]

§ 198. (II) **The receipt of benefit by defendant.** — The performance of one's legal *obligation* is necessarily a benefit to him, since it saves him the necessity either of performing the duty himself or of paying the penalty of non-performance. The protection of one's *property*, on the other hand, may not constitute a benefit, for one is not bound to protect his own property, and does not always regard it as worth the effort and expense necessary to its protection. This was recognized in the Massachusetts case of *Earle* v. *Coburn*,[4] which was an action

[1] Manhattan Fire Alarm Co. *v.* Weber, 1898, 22 Misc. R. 729; 50 N. Y. Supp. 42.

[2] Quin *v.* Hill, 1886, 4 Dem. (N. Y. Surrogate's Court) 69, (mother, disregarding husband's rights, directed and paid for daughter's burial); Manhattan Fire Alarm Co. *v.* Weber, 1898, 22 Misc. R. 729; 50 N. Y. Supp. 42.

[3] Mulligan *v.* Kenny, 1882, 34 La. Ann. 50. There may be an exception in case of the protection of another's animal. See Great Northern R. Co. *v.* Swaffield, 1874, L. R. 9 Exch. 132.

[4] 1881, 130 Mass. 596, 598. *Accord:* Keith *v.* De Bussigney, 1901, 179 Mass. 255; 60 N. E. 614.

for the board and stabling of a horse. The plaintiff had exchanged the horse in question with the defendant for a wagon, but controversy arising, the defendant returned the horse and demanded the wagon. The plaintiff refusing to give up the wagon, the defendant sued the plaintiff for conversion, but without success. The plaintiff told the defendant, when the latter returned the horse, that he left it on his own responsibility and expense, but the defendant disclaimed ownership and responsibility. Said the court:

"There may be cases where the law will imply a promise to pay by a party who protests he will not pay; but those are cases in which the law creates a duty to perform that for which it implies a promise to pay, notwithstanding the party owing the duty absolutely refuses to enter into an obligation to perform it. The law promises in his stead and in his behalf. If a man absolutely refuses to furnish food and clothing to his wife or minor children, there may be circumstances under which the law will compel him to perform his obligations, and will of its own force imply a promise against his protestation. But such promise will never be implied against his protest, except in cases where the law itself imposes a duty: and this duty must be a legal duty."

In cases of the protection of property, therefore, it must appear that the particular property which the plaintiff intervened to protect was worth, in the defendant's eyes, as much as he is called upon to pay the plaintiff for its protection. And if the plaintiff is entitled to recover the value of his services, it would seem that the defendant should always enjoy the option of surrendering to the plaintiff the property protected instead of paying for its protection.

§ 199. (III) **Retention of benefit inequitable: Gratuitous intervention.** — Although instances of benefits conferred by dutiful intervention in another's affairs are probably as frequent as those of benefits conferred by mistake, or compulsion, the topic is reduced to a comparatively narrow compass by the fact that in most cases of such intervention, the benefit is con-

ferred without expectation of compensation, and there is consequently no injustice in the retention of the benefit.[1]

§ 200. (IV) **Sundry instances of the obligation.** — For convenience, sundry instances in which the obligation may arise will be considered in the following groups:

(1) Preservation of life.
(2) Necessaries furnished infant or insane person.
(3) Necessaries furnished wife or children.
(4) Necessaries furnished pauper.
(5) Burial of the dead.
(6) Preservation of property.
(7) Performance of another's contractual duty.
(8) Performance of another's statutory duty to repair roads.

§ 201. (1) **Preservation of life: Services in emergency.** — It seems to be taken for granted that at the common law there is no legal obligation, independent of contract, to pay for *non-professional* services rendered, in an emergency, in the preservation of life. The intervention may be dutiful; the conduct of the intervenor may be heroic. But as in the cases of preservation of property, hereafter to be considered, there is an irrebuttable presumption, based either upon considerations of policy or upon knowledge of normal human conduct, that the service is intended to be gratuitous.[2]

The considerations which underlie the irrebuttable presumption just referred to have no application in the case of *professional* services — as of a physician or nurse. For while such services are usually prompted, in greater or less measure, by motives of humanity, they are generally rendered with the

[1] But see France's Est., 1874, 75 Pa. St. 220, 225, where a widow paid funeral expenses of her husband and subsequently sought to hold the estate liable. Said MERCUR, J.: "Nor does the fact that the widow said to a stranger, she did not intend any one else to pay the expenses, and that she did it voluntarily out of respect to her husband, constitute any bar to her right to recover them."

[2] The admiralty law allows a recovery for the saving of life where property is saved to form a fund from which the life salvage may be paid. The Renpor, 1883, 8 P. D. 115. And the English Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104, § 459), provides for life salvage. See The Gas Float Whitton, [1896] P. 42, 57.

expectation of compensation. Moreover, in the case of a physician or nurse, there is nothing unworthy in such an expectation. It follows that for professional services, unless there is evidence either that credit was extended to a third party [1] or that there was no intention to charge, the beneficiary should be required to pay reasonable value.[2]

An interesting question is presented by the cases in which it is held that a railroad company is liable for services rendered to an injured person, in an emergency, by a physician employed, in the absence of any general officer, by the highest subordinate representative of the company on the ground.[3] The decisions rest, ostensibly, upon the theory of a contract between the physician and the company. It seems clear, however, that a conductor or other subordinate servant of the company has no actual implied authority to employ a physician, and that consequently there is no genuine contract.

[1] Brandner *v.* Krebbs, 1894, 54 Ill. App. 652, (physician).

[2] Cotnam *v.* Wisdom, 1907, 83 Ark. 601, 104 S. W. 164; 12 L. R. A. (N. S.) 1090; 119 Am. St. Rep. 157, (physician). See, anticipating the decision in Cotnam *v.* Wisdom, *supra*, Richardson *v.* Strong, 1851, 13 Ired. Law (35 N. C.) 106, 108; 55 Am. Dec. 430, where RUFFIN, C.J., in holding that a lunatic is liable for the services of a nurse and guard, as necessaries, said: "It is as if a physician administered to a man deprived of his senses by a dangerous blow, when the loss of life might result from delay. He would certainly be bound to make reasonable remuneration, though incapable at the moment of making an actual request." Also Bishop, "Contracts," § 231: "Should a medical practitioner be called by an unauthorized person to a man deprived of his senses by a blow, rendering immediate relief necessary to save life, duty would require it to be given. And, if he gave it, not in charity but expecting to be paid, the law would create a promise of payment from the patient, who, in fact, not even asked for the aid, or consented to its being rendered; being incapable of asking or consenting." See also Raoul *v.* Newman, 1877, 59 Ga. 408, 413; Pray *v.* Stinson, 1842, 21 Me. 402; Edson *v.* Hammond, 1911, 127 N. Y. Supp. 359, 361; 142 App. Div. 693.

[3] Ark., etc., R. Co. *v.* Loughridge, 1898, 65 Ark. 300; 45 S. W. 907; Bonnette *v.* St. Louis, etc., R. Co., 1908, 87 Ark. 197; 112 S. W. 220; 16 L. R. A. (N. S.) 1081; 128 Am. St. Rep. 30; Chicago, etc., R. Co. *v.* Davis, 1900, 94 Ill. App. 54; Terre Haute, etc., R. Co. *v.* McMurray, 1884, 98 Ind. 358; 49 Am. Rep. 752; Southern R. Co. *v.* Brister, 1901, 79 Miss. 761; 31 So. 440.

Upon principle, whether or not there is a quasi contractual obligation depends upon the duty of the company to the person injured (see *ante*, § 194). If, in a particular case, it can be said that the company is under a legal duty to provide the person injured with medical or surgical attendance, the physician is in the position of one who dutifully intervenes in the company's affairs and performs its obligation. But if the company owes no such duty to the person injured, there is no satisfactory basis upon which it may be held responsible to the physician. The question as to the duty of the company to the person injured pertains to the law of tort or of carriers and need not be considered here.

§ 202. (2) **Necessaries furnished infant or insane person.** — The presumption that services rendered in the preservation of life are gratuitous arises only in cases of emergency. For necessaries of life furnished in a non-emergency case, therefore, the intervenor should recover. Where the recipient is a competent adult, the acceptance of the tendered benefit results in a binding contractual obligation to pay the reasonable value thereof. But where the recipient is an infant or a person *non compos mentis*, the acceptance of food, clothing, or shelter cannot be regarded in every case as raising a genuine implied promise, and even when such a promise is raised it is voidable. In the case of necessaries furnished to an infant or insane person, therefore, the obligation to pay the reasonable value thereof is quasi contractual.[1] It is a clear case of dutiful intervention (see *ante*, § 194) and the obligation is everywhere recognized.[2]

[1] The quasi contractual nature of the obligation is shown by the cases holding that an express promise to pay for necessaries more than they are reasonably worth cannot be enforced. Beeler *v.* Young, 1809, 1 Bibb (4 Ky.) 519; Earle *v.* Reed, 1845, 10 Metc. (Mass.) 387; Locke *v.* Smith, 1860, 41 N. H. 346, 352.

[2] *Necessaries furnished infant:* Nash *v.* Inman, [1908] 2 K. B. 1; Barnes *v.* Barnes, 1883, 50 Conn. 572; Watson *v.* Cross, 1856, 2 Duv. (63 Ky.) 147; Kilgore *v.* Rich, 1891, 83 Me. 305; 22 Atl. 176; 12 L. R. A. 859; 23 Am. St. Rep. 780; McConnell *v.* McConnell, 1909, 75 N. H. 385; 74 Atl. 875; Werner's Appeal, 1879, 91 Pa. St. 222; Bradley *v.* Pratt, 1851, 23 Vt. 378.

§ 203. (3) **Necessaries furnished** (*a*) **wife or** (*b*) **children.** — (*a*) The husband is under a plain legal duty to support his wife, unless she lives apart from him without his fault. If he fails to perform this duty, one who furnishes necessaries to her may recover from him the reasonable value thereof.[1] It is often said that the wife, under such circumstances, is to be regarded as the "agent of necessity" of her husband, but unquestionably the real basis of the obligation is the quasi contractual doctrine of dutiful intervention.

(*b*) Inconceivable as it may seem, there is actually a difference of judicial opinion as to the existence, at the common law, of an obligation on the part of the parent to support his infant child.[2] Wherever it is held that such an obligation does exist, it is clear, upon principle (see *ante*, § 194) and authority, that if the parent fails to discharge it, he is liable to a third person for the reasonable value of necessaries furnished to the child.[3]

Necessaries furnished insane person: Baxter *v.* Earl of Portsmouth, 1826, 5 Barn. & Cr. 170; *In re* Rhodes, 1890, 44 Ch. Div. 94; *Ex parte* Northington, 1861, 37 Ala. 496; 79 Am. Dec. 67; Estate of Yturburru, 1901, 134 Cal. 567; 66 Pac. 729; Michaels *v.* Central Kentucky Asylum, 1904, 118 Ky. 445; 81 S. W. 247, (deduction for services rendered by insane person); D. M. Smith's Comm. *v.* Forsythe, 1906, 28 Ky. Law Rep. 1034; 90 S. W. 1075; Sawyer *v.* Lufkin, 1868, 56 Me. 308; Sceva *v.* True, 1873, 53 N. H. 627; Richardson *v.* Strong, 1851, 13 Ired. Law (35 N. C.) 106; 55 Am. Dec. 430.

The obligation of both infant and insane person to pay for necessaries is fully considered in treatises on persons, and a further discussion in this work would be profitless.

[1] Bolton *v.* Prentice, 1744, 2 Str. 1214; Pierpont *v.* Wilson, 1881, 49 Conn. 450; Watkins *v.* De Armond, 1883, 89 Ind. 553; Baker *v.* Oughton, 1906, 130 Ia. 35; 106 N. W. 272; Mayhew *v.* Thayer, 1857, 8 Gray (Mass.) 172; Walker *v.* Laighton, 1855, 31 N. H. 111; Clothier *v.* Sigle, 1906, 73 N. J. L. 419; 63 Atl. 865.

[2] See Tiffany, "Persons and Domestic Relations" (2d ed.), p. 251, and cases there cited and discussed.

[3] Stanton *v.* Willson's Extrs., 1808, 3 Day (Conn.) 37; 3 Am. Dec. 255, (*cf.* Finch *v.* Finch, 1853, 22 Conn. 411, 420); Watkins *v.* De Armond, 1883, 89 Ind. 553; Porter *v.* Powell, 1890, 79 Ia. 151; 44 N. W. 295; 7 L. R. A. 176; 18 Am. St. Rep. 353; Reynolds *v.* Sweetser, 1860, 15 Gray (Mass.) 78; Hyde *v.* Leisenring, 1895, 107 Mich. 490; 65 N. W. 536; Manning *v.* Wells, 1894, 8 Misc. R. 646; 29 N. Y. Supp. 1044;

§ 204. (4) **Necessaries furnished pauper.** — Municipal or county authorities are generally required by statute to furnish aid and support to paupers, although the enactments are far from uniform in their provisions. If, in a particular case, the proper authorities, after reasonable notice, fail to discharge their duty, any one may intervene and supply food, lodging, or other necessaries.[1] But if notice is not first given to the authorities (see *ante*, § 195), there can be no recovery,[2] except, perhaps, for medical services rendered in an emergency.[3] The case of one public corporation furnishing relief to a pauper for whose support another corporation is responsible is generally

Pretzinger *v.* Pretzinger, 1887, 45 Ohio St. 452; 15 N. E. 471; 4 Am. St. Rep. 542. But see Kelly *v.* Davis, 1870, 49 N. H. 187; 6 Am. Rep. 499, (*cf.* Pidgin *v.* Cram, 1836, 8 N. H. 350, 353).

The obligation of the husband to pay for necessaries furnished his wife or children is fully considered in treatises on persons and domestic relations, and a further discussion of it in this book would be profitless.

[1] Seagraves *v.* City of Alton, 1851, 13 Ill. 366; Randolph *v.* Town of Greenwood, 1905, 122 Ill. App. 23; Knight *v.* Fairfield, 1880, 70 Me. 500; Eckman *v.* Township of Brady, 1890, 81 Mich. 70; 45 N. W. 502; Shreve *v.* Budd, 1802, 7 N. J. L. 431; Trustees of Cincinnati Township *v.* Ogden, 1831, 5 Ohio 23. In some States recovery is denied, although authorities refuse relief, on the ground that the statute provides the sole manner in which the county may be made liable for support of the poor. Otis *v.* Strafford, 1839, 10 N. H. 352; St. Luke's Hospital Assn. *v.* Grand Forks County, 1898, 8 N. D. 241; 77 N. W. 598; Houghton *v.* Town of Danville, 1838, 10 Vt. 537; Patrick *v.* Baldwin, 1901, 109 Wis. 342; 85 N. W. 274; 53 L. R. A. 613. And see Miller *v.* Somerset, 1817, 14 Mass. 396.

[2] Reynolds *v.* Board of Supervisors, 1881, 59 Miss. 132; Marshall County *v.* Rivers, 1906, 88 Miss. 45; 40 So. 1007; Duval *v.* Laclede County, 1855, 21 Mo. 396; Hamilton County *v.* Myers, 1888, 23 Neb. 718; 37 N. W. 623; Smith *v.* Williams, 1895, 13 Misc. R. 761; 35 N. Y. Supp. 236; Salsbury *v.* City of Philadelphia, 1863, 44 Pa. St. 303; Caswell *v.* Hazard, 1873, 10 R. I. 490.

[3] County of Madison *v.* Haskell, 1895, 63 Ill. App. 657; Board of Supervisors *v.* Gilbert, 1893, 70 Miss. 791; 12 So. 593; Robbins *v.* Town of Homer, 1905, 95 Minn. 201; 103 N. W. 1023; Board of Com'rs *v.* Denebrink, 1907, 15 Wyo. 342; 89 Pac. 7; 9 L. R. A. (N. S.) 1234. And see Poor District of Summit *v.* Byers, 1887, 8 Pa. Cas. 222; 11 Atl. 242. But see, *contra*, French *v.* Benton, 1862, 44 N. H. 28; Gourley *v.* Allen, 1825, 5 Cow. (N. Y.) 644; Caswell *v.* Hazard, 1873, 10 R. I. 490. *Cf.* Hendricks *v.* County of Chautauqua, 1886, 35 Kan. 483; 11 Pac. 450.

provided for by statute. It has been held that there is no common law liability to reimburse,[1] but, fortunately, there is authority to the contrary.[2]

In statutes providing for the support of the poor, a liability for such support is often imposed upon children, parents, or other near relatives. Usually the procedure for enforcing this obligation is prescribed, but in the absence of a prescribed procedure the proper authorities may furnish the support and recover the value thereof from those upon whom the obligation rests.[3]

§ 205. (5) **Burial of the dead: obligation of** (*a*) **estate,** (*b*) **husband,** (*c*) **county.** — (*a*) It is settled that the reasonable and necessary expenses of the interment of the body of a deceased person constitute a charge against his estate.[4] The executor, therefore, should contract for such interment and pay the expenses. Not infrequently, however, it is impossible or impracticable to ascertain at once who is named as executor, and to secure his authority. If no executor is appointed, it is, of course, out of the question to await the appointment of an administrator. Such a situation clearly demands that some one intervene in the representative's affairs and perform his duty for him (see *ante*, § 194). And for the benefit conferred by such an intervention the executor or administrator must make restitution:

[1] Otoe County *v.* Lancaster County, 1907, 78 Neb. 517; 111 N. W. 132; Town of Morristown *v.* Town of Hardwick, 1908, 81 Vt. 31; 69 Atl. 152.

[2] Town of Wethersfield *v.* Stanford, 1774, 1 Root (Conn.) 68; Bristol *v.* New Britain, 1898, 71 Conn. 201; 41 Atl. 548; County of Perry *v.* City of Du Quoin, 1881, 99 Ill. 479; City of Macomb *v.* County of McDonough, 1907, 134 Ill. App. 532; Ogden City *v.* Weber County, 1903, 26 Utah 129; 72 Pac. 433. And see Overseers of North Whitehall *v.* Overseers of South Whitehall, 1817, 3 Serg. & R. (Pa.), 117.

[3] McCook County *v.* Kammoss, 1895, 7 S. D. 558; 64 N. W. 1123; 31 L. R. A. 461; 58 Am. St. Rep. 854.

[4] Rogers *v.* Price, 1829, 3 Younge & J. 28; Fogg *v.* Holbrook, Extr., 1895, 88 Me. 169; 33 Atl. 792; 33 L. R. A. 660; Hapgood *v.* Houghton, 1830, 10 Pick. (Mass.) 154; Constantinides *v.* Walsh, Extr., 1888, 146 Mass. 281; 15 N. E. 631; 4 Am. St. Rep. 311; Patterson *v.* Patterson, 1875, 59 N. Y. 574; 17 Am. Rep. 384.

Rogers v. *Price, Executor*, 1829, 3 Younge & J. 28: Assumpsit for work and labor as an undertaker and materials furnished for the funeral of the testator. The testator died at the house of his brother, who sent for the plaintiff, an undertaker. There was no evidence of any contract with the defendant, or that he knew of the funeral. GARROW, B. (p. 34): "The simple question is, nothwithstanding many ingenious views of the case have been presented, who is answerable for the expenses of the funeral of this gentleman. In my opinion, the executor is liable. Suppose a person to be killed by accident at a distance from his home; what, in such a case, ought to be done? The common principles of decency and humanity, the common impulses of our nature, would direct every one, as a preliminary step, to provide a decent funeral, at the expense of the estate; and to do that which is immediately necessary upon the subject, in order to avoid what, if not provided against, may become an inconvenience to the public. Is it necessary in that or any other case to wait until it can be ascertained whether the deceased has left a will, or appointed an executor; or, even if the executor be known, can it, where the distance is great, be necessary to have communication with that executor before any step is taken in the performance of those last offices which require immediate attention? It is admitted here that the funeral was suitable to the degree of the deceased, and upon this record it must be taken that the defendant is executor with assets sufficient to defray this demand; I therefore think that, if the case had gone to the jury, they would have found for the plaintiff, and that therefore this rule should be made absolute." [1]

[1] *Accord:* Tugwell *v.* Heyman, 1812, 3 Camp. 298; Golsen *v.* Golsen, 1906, 127 Ill. App. 84; Hildebrand *v.* Kinney, 1909, 172 Ind. 447; 87 N. E. 832; Patterson *v.* Patterson, 1875, 59 N. Y. 574; 17 Am. Rep. 384; Ray *v.* Honeycutt, 1896, 119 N. C. 510; 26 S. E. 127, (explaining Gregory *v.* Hooker's Admr., 1821, 1 Hawkes (8 N. C.) 394; 9 Am. Dec. 646); France's Est., 1874, 75 Pa. St. 220; O'Reilly *v.* Kelly, 1900, 22 R. I. 151; 46 Atl. 681; 50 L. R. A. 483; 84 Am. St. Rep. 833; Waters *v.* Register, 1907, 76 S. C. 132; 56 S. E. 849. In Patterson *v.* Patterson, *supra*, the court said (p. 583): "And our Revised Statutes (2 R. S. 71, sec. 16) recognize this duty, in that the executor is prohibited from any interference with the estate until after probate, except that he may discharge the funeral expenses. From this duty springs a legal obligation, and from the obligation the law implies a promise

The circumstances of a death generally point to a particular person as the one who may suitably intervene to pay the expenses of interment.[1] One who pushes forward without justification to pay such expenses is an officious meddler (see *ante*, § 196) and is not entitled to restitution out of the estate or from the person primarily liable.[2]

(*b*) Under the common law, it was the duty of the husband to give a suitable burial to the body of his deceased wife, and consequently one who performed that duty in the absence of the husband, or upon the husband's failure to perform it (see *ante*, § 195), could recover from him the expenses incurred therein:

Jenkins v. *Tucker*, 1788, 1 H. Bl. 90: Action to recover money expended in paying debts and defraying funeral expenses of defendant's wife, who was plaintiff's daughter and who died while the defendant was in Jamaica. Lord LOUGHBOROUGH (p. 93): "I think there was a sufficient consideration to support

to him who, in the absence or neglect of the executor, not officiously, but in the necessity of the case, directs a burial and incurs and pays such expense thereof as is reasonable. It is analogous to the duty and obligation of a father to furnish necessaries to a child, and of a husband to a wife, from which the law implies a promise to pay him who does what the father or the husband, in that respect, omits. . . . The decent burial of the dead is a matter in which the public have concern. It is against the public health if it do not take place at all, and against a proper public sentiment, that it should not take place with decency." See also McCullough *v.* McCready, 1907, 52 Misc. 542, 102 N. Y. Supp. 633, *aff.* 1907, 122 App. Div. 888; 106 N. Y. Supp. 1135, allowing expenses of a wake paid by a nephew of decedent. In O'Reilly *v.* Kelly, *supra*, the claim was for flowers furnished for the funeral; they were held "necessary."

[1] Jenkins *v.* Tucker, 1788, 1 H. Bl. 90, (father of married woman in the absence of husband); Rogers *v.* Price, Extr., 1829, 3 Younge & J. 28, (brother in whose house death occurred); Stone *v.* Tyack, 1911, 164 Mich. 550; 129 N. W. 694, (step-father); France's Est., 1874, 75 Pa. St. 220, (widow); O'Reilly *v.* Kelly, 1900, 22 R. I. 151; 46 Atl. 681; 50 L. R. A. 483; 84 Am. St. Rep. 833, (housekeeper).

[2] Quin *v.* Hill, 1886, 4 Dem. (N. Y. Surrogate's Court) 69, (mother). And see Foley *v.* Bushway, 1874, 71 Ill. 386, (widow); Lerch *v.* Emmett, 1873, 44 Ind. 331, (mother); Fay *v.* Fay, 1887, 43 N. J. Eq. 438, (administrator of decedent's grandfather's estate); Samuel *v.* Thomas, 1881, 51 Wis. 549; 8 N. W. 361, (sister).

this action for the funeral expenses, though there was neither request nor assent on the part of the Defendant, for the Plaintiff acted in discharge of a duty which the Defendant was under a strict legal necessity of himself performing, and which common decency required at his hands; the money therefore which the Plaintiff paid on this account, was paid to the use of the Defendant. A father also seems to be the proper person to interfere in giving directions for his daughter's funeral, in the absence of her husband." [1]

But under the modern statutes establishing the independent position of married women with regard to their property, it would seem that the liability of the estate is primary, and that the husband is chargeable only in the event that the estate is insufficient to meet the obligation. It follows that when a married woman dies leaving sufficient property to pay her funeral expenses and the circumstances impose upon the husband a moral duty to pay them, he should have an action against the executor or administrator for reimbursement. It has been so held,[2] though there are cases to the contrary,[3] some of which obviously rest upon a presumption that the benefit is conferred gratuitously (see *ante*, § 199).

(*c*) An interesting Missouri case, in which an erroneous

[1] *Accord:* Ambrose *v.* Kerrison, 1851, 10 C. B. 776; Bradshaw *v.* Beard, 1862, 12 C. B. (N. S.) 344; Cunningham *v.* Reardon, 1868, 98 Mass. 538; 96 Am. Dec. 670; Stone *v.* Tyack, 1911, 164 Mich. 550 129 N. W. 694; Gleason *v.* Warner, 1899, 78 Minn. 405; 81 N. W. 206.

[2] Lightbown *v.* McMyn, 1886, 33 Ch. D. 575; *In re* Skillman's Estate, 1910, 146 Ia. 601; 125 N. W. 343; 140 Am. St. Rep. 295; Constantinides *v.* Walsh, Extr., 1888, 146 Mass. 281; 15 N. E. 631; 4 Am. St. Rep. 311; Freeman *v.* Coit, 1882, 27 Hun (N. Y. Sup.) 447; Quin *v.* Hill, 1886, 4 Dem. (N. Y. Surrogate's Court) 69; Pache *v.* Oppenheim, 1904, 93 App. Div. 221; 87 N. Y. Supp. 704; McClellan *v.* Filson, 1886, 44 Ohio St. 184; 5 N. E. 861; 58 Am. Rep. 814; Moulton *v.* Smith, 1888, 16 R. I. 126; 12 Atl. 891; 27 Am. St. Rep. 728.

[3] Smyley *v.* Reese, 1875, 53 Ala. 89; 25 Am. Rep. 598; *In re* Werfinger, 1893, 100 Cal. 345; 34 Pac. 825; Staples' Appeal, 1884, 52 Conn. 425; Kenyon *v.* Brightwell, 1904, 120 Ga. 606; 48 S. E. 124; Brand's Extr. *v.* Brand, 1901, 109 Ky. 721; 22 Ky. Law Rep. 1366; 60 S. W. 704, (*cf.* Towery *v.* McGaw, 1900, 22 Ky. Law Rep. 155; 56 S. W. 727); Stonesifer *v.* Shriver, 1904, 100 Md. 24; 59 Atl. 139; Stone *v.* Tyack, 1911, 164 Mich. 550; 129 N. W. 694.

decision would seem to have been reached, is *Duval* v. *Laclede County*.[1] The plaintiff paid the funeral expenses of a poor person who died in his house and presented a claim to the county court pursuant to the provisions of a statute prescribing that the county court should allow such sum as it should deem reasonable for the funeral expenses of any person who should die without means to pay such funeral expenses. It was held by the Supreme Court that the plaintiff was not entitled to an allowance. Said the court:

"Assuming that the deceased was a poor person of the county, and that the burial of the county poor, as well as their support during life, is embraced in the general duty to take care of them, . . . it would be against all principle to allow the plaintiff voluntarily to discharge this duty for the county, and in this manner become its creditor, without its consent, for services rendered, or money expended, in taking care of its poor."

Scott, J., however, entered a strong dissent, saying:

"This section, I conceive, makes it the imperative duty of the county to pay the reasonable expenses of burying its poor. The law did not intend to give a discretion to the court, whether it would pay or not. For the sake of humanity, it intended that every man who would bury the decaying bodies of the poor, should be paid. In such cases, there is no time to wait — there is no time to consult or ask advice, and therefore the law promises to pay any one who will bury the body. If the law was such that the party would only be paid in the event the county court thought proper to do so, the dead body, in many cases, might go unburied, or buried in such a manner as would be a a disgrace to humanity."

And in a later case[2] the Supreme Court declared that if it were a case of first impression they might be inclined to follow the views of Judge Scott.

§ 206 (6) **Preservation of property: Maritime salvage.** — The familiar doctrine of salvage, in the admiralty law, affords

[1] 1855, 21 Mo. 396, 397, 398.
[2] Handlin *v.* Morgan County, 1874, 57 Mo. 114, 116.

a striking illustration of the principle of dutiful intervention as applied to the preservation of property.[1] Salvage is defined as compensation allowed to persons by whose assistance a ship or its cargo or both have been saved, in whole or in part, from impending peril, or recovered from actual loss. Obviously, the essentails of quasi contractual liability as set forth in the preceding sections (*ante*, §§ 191, 192, 197) are all present:

1. The ship or cargo must be in such peril as reasonably to call for intervention.[2]

2. The intervention must result in a benefit to the owner or person otherwise interested against whom claim is made.[3] That is to say, compensation will not be allowed, however great and meritorious are the claimant's exertions, if the property is not saved.

3. If the claimant was under an obligation to render the services,[4] or through his fault contributed to place the property

[1] The City of Chester, 1884, 9 P. D. 182. Austin cites *negotiorum gestio* in the Roman Law and salvage in the English as instances of quasi contract. Austin, "Jurisprudence" (3d ed.), p. 944.

[2] Akerblom *v.* Price, 1881, 7 Q. B. D. 129; The Aglaia, 1888, 13 P. D. 160; Seven Coal Barges, 1870, 2 Biss. (U. S. C. C.) 297; Fed. Cas. No. 12,677; The Plymouth Rock, 1881, 9 Fed. 413, (U. S. D. C. N. Y.); The Alamo, 1896, 75 Fed. 602; 21 C. C. A. 451; 41 U. S. App. 468; The Mannie Swan, 1906, 145 Fed. 747, (U. S. D. C. N. Y.); The New Haven, 1908, 159 Fed. 798, (U. S. D. C. Conn.).

[3] The Zephyrus, 1842, 1 W. Rob. 329; The India, 1842, 1 W. Rob. 406; The Sabine, 1879, 101 U. S. 384; The City of Puebla, 1907, 153 Fed. 925, (U. S. D. C. Cal.); The Loch Garve, 1910, 182 Fed. 519; 105 C. C. A. 57. In The Zephyrus, *supra*, Dr. Lushington said (p. 330): "Now I apprehend that, upon general principles, a mere attempt to save the vessel and cargo, however meritorious that attempt may be, or whatever degree of risk or danger may have been incurred, if unsuccessful, can never be considered in this Court as furnishing any title to a salvage reward. The reason is obvious, viz. that salvage reward is for benefits actually conferred, not for a service attempted to be rendered."

[4] The Branston, 1826, 2 Hagg. Admr. 3; The Clarita, 1874, 23 Wall. 1, 17 (*semble*); The Wave, 1827, 2 Paine (U. S. C. C.) 131; Fed. Cas. No. 17,300; The Holder Borden, 1847, 1 Spr. (U. S. D. C. Mass.) 144; Fed Cas. No. 6600; The Olive Branch, 1868, 1 Lowell (U. S. D. C. Mass.) 286; Fed. Cas. No. 10,490; The Brabo, 1887, 33 Fed. 884, (U. S. D. C. Ala.); Kidney *v.* The Ocean Prince, 1889, 38 Fed. 259, (U. S. D. C. Tex.); The C. P. Minch, 1894, 61 Fed. 511, (U. S. D. C.

in peril,[1] or was guilty of willful or grossly negligent misconduct toward the defendant,[2] the retention of the benefit is not unjust, and therefore compensation will not be allowed.

It should be added that the obligation in maritime salvage cases differs from that in cases of dutiful intervention under the common law in that a salvor, under the maritime law, has a lien upon the proprety saved, which enables him to maintain a suit *in rem* against the ship or cargo. This is the remedy commonly pursued. But the salvor, at his election, may proceed *in personam* against the owner or the person benefited by the service.[3] And the action *in personam* is the only available

N. Y.); Gilbraith *v.* Stewart Transp. Co., 1902, 121 Fed. 540; 57 C. C. A. 602; 64 L. R. A. 193.

[1] Cargo ex Capella, 1867, L. R. 1 A. & E. 356; The Duc d'Aumale, [1904] P. 60; The Clarita, 1874, 23 Wall. (U. S.) 1; American Insurance Co. *v.* Johnson, 1827, Bl. & H. (U. S. D. C. N. Y.) 9; Fed. Cas. No. 303; The Charles E. Soper, 1883, 19 Fed. 844 (U. S. D. C. N. Y.); The Pine Forest, 1904, 129 Fed. 700; 64 C. C. A. 228; 1 L. R. A. (N. S.) 873.

[2] The Capella, [1892] P. 70, (taking possession against protest of ship's officers and other misconduct); The Blaireau, 1804, 2 Cranch (U. S.) 240, (misappropriation of part of the property saved); The Bello Corrunes, 1821, 6 Wheat. (U. S.) 152, (stranding the vessel); The Aberdeen, 1885, 27 Fed. 479, (U. S. D. C.), (abandonment of vessel after taking possession); The Henry Steers, Jr., 1901, 110 Fed. 578, (U. S. D. C. N. Y.), (abandonment); The Bremen, 1901, 111 Fed. 228, (U. S. D. C. N. Y.), (negligent conduct causing fire, practically extinguished, to break out again); The Olympia, 1909, 181 Fed. 187, (D. C. Fla.), (obtaining acquiescence of master by fraud); The Minnie E. Kelton, 1910, 181 Fed. 237, (U. S. D. C. Or.), (unskillful handling detracting from value of service).

[3] According to most of the decisions the right *in personam* is limited to cases of genuine contract. That is to say, the salvor is restricted to proceedings *in rem*, unless it appears that the owner either contracted for his services in advance, or in consideration of the surrender to him of the property saved expressly or impliedly assumed a personal liability. The Elton, [1891] P. 265; The Sabine, 1879, 101 U. S. 384; The Emblem, 1840, 2 Ware (Dav. 61) (U. S. D. C. Me.) 68; Fed. Cas. No. 4434; The Independence, 1855, 2 Curtis (U. S. C. C.) 350; Fed. Cas. No. 7014; Seaman *v.* Erie, etc., R. Co. 1868, 2 Ben. (U. S. D. C. N. Y.) 128; Fed. Cas. No. 12,582. And see Admiralty Rule 19, promulgated by the United States Supreme Court. But it is declared in a recent English decision that "the action *in personam* did not arise out of jurisdiction *in rem*, and that the distinction between actions *in*

remedy when the property saved is subsequently destroyed, or seized under legal process.[1]

§ 207. **Same: Salvage at the common law.** — The doctrine of salvage is peculiar to admiralty law, the common law raising an irrebuttable presumption, based either upon considerations of policy or upon knowledge of normal human conduct, that services rendered in an emergency in the preservation of property, like emergency services in the preservation of life (*ante*, § 201), are gratuitous:

Bartholomew v. *Jackson*, 1822, 20 Johns. (N. Y.) 28; 11 Am. Dec. 237: Action for work and labor in removing defendant's stack of wheat from the plaintiff's stubble field. The defendant had promised to remove the stack in due season for preparing the ground for a fall crop. The time having arrived, the plaintiff sent a message to the defendant, which is his absence was delivered to his family, requesting the immediate removal of the stack, as he wished, on the next day, to burn the stubble. The defendant's sons answered that they would remove the stack by ten o'clock the next morning. At that hour the plaintiff set fire to the stubble in a remote part of the field, which spread rapidly and threatened to destroy the stack of wheat. Thereupon, the plaintiff, seeing that the defendant neglected to remove the stack, removed it himself. PLATT, J. (p. 28): "The plaintiff performed the service without the privity or request of the defendant; and there was, in fact, no promise, express or implied. If a man humanely bestows his labor, and even risks his life, in voluntarily aiding to preserve his neighbor's house from destruction by fire, the law considers the service rendered as *gratuitous*, and it, therefore, forms no ground of action." [2]

personam and actions *in rem* depended only on whether the person or property of the defendant was arrested in the first instance." The Cargo ex Port Victor, 1901, 17 Times L. R. 378, 380. And see The Hope, 1801, 3 C. Rob. 215 and note.

[1] Hudson *v.* Whitmire, 1896, 77 Fed. 846, (U. S. D. C. Fla.). And see Five Steel Barges, 1890, 15 P. D. 142. But see The Chieftain, 1846, 4 Not. of Cas. 459.

[2] *Accord:* Watson *v.* Ledoux, 1853, 8 La. Ann. 68; New Orleans, etc., R. Co. *v.* Turcan, 1894, 46 La. Ann. 155; 15 So. 187. And see Falcke *v.* Scottish Imperial Ins. Co., 1886, 34 Ch. D. 234, 248, in which Lord

This presumption that the service is gratuitously rendered may properly be invoked, it would seem, only in cases of sudden emergency (see *ante*, § 202), as where property is about to be destroyed by fire. Accordingly, there are a number of cases of *non-emergency* services in which a recovery has been allowed:

Chase v. *Corcoran*, 1871, 106 Mass. 286: Action for money paid in moving and repairing the defendant's boat and for compensation for care and trouble in keeping and repairing the same. The plaintiff found the boat adrift and in danger of destruction, towed it ashore, and after making efforts to find the owner, took it to his barn, stowed it there for two winters and during the intervening summer made certain repairs which were necessary for its preservation. The defendant subsequently claimed the boat, the plaintiff refused to deliver it unless expenses of caring for it were paid, and the defendant then took the boat by a writ of replevin. GRAY, J. (p. 288): "The claim of the plaintiff is therefore to be regulated by the common law. It is not a claim for salvage for saving the boat when adrift and in danger on tidewater; and does not present the question whether the plaintiff had any lien upon the boat, or could recover for salvage services in an action at common law. His claim is for the reasonable expenses of keeping and repairing the boat after he had brought it to shore; and the single question is, whether a promise is to be implied by law from the owner of a boat, upon taking it from a person who has found it adrift on tidewater and brought it ashore, to pay him for the necessary expenses of preserving the boat while in his possession. We

Justice BOWEN said: "The general principle is, beyond all question, that work and labour done or money expended by one man to preserve or benefit the property of another do not, according to English law, create any lien upon the property saved or benefited, nor, even if standing alone, create any obligation to repay the expenditure. Liabilities are not to be forced upon people behind their backs any more than you can confer a benefit upon a man against his will. . . . The maritime law, for the purposes of public policy and for the advantage of trade, imposes in these cases a liability upon the thing saved, a liability which is a special consequence arising out of the character of mercantile enterprises, the nature of sea perils, and the fact that the thing saved was saved under great stress and exceptional circumstances. No similar doctrine applies to things lost upon land, nor to anything except ships or goods in peril at sea."

are of the opinion that such a promise is to be implied. The plaintiff, as the finder of the boat, had the lawful possession of it, and the right to do what was necessary for its preservation. Whatever might have been the liability of the owner if he had chosen to let the finder retain the boat, by taking it from him he made himself liable to pay the reasonable expenses incurred in keeping and repairing it." [1]

[1] *Accord:* Reeder *v.* Anderson's Admrs., 1836, 4 Dana (34 Ky.) 193, (ROBERTSON, C.J.: "The only question to be considered in this case, is whether the law will imply a promise by the owner of a runaway slave, to pay a reasonable compensation to a stranger for a voluntary apprehension and restitution of the fugitive. And, though such friendly offices are frequently those only of good neighborship, which should not be influenced by mercenary motives or expectations — nevertheless, it seems to us that there is an implied request from the owner, to all other persons to endeavor to secure to him lost property which he is anxious to retrieve; and that, therefore, there should be an implied undertaking to (at least) indemnify any person who shall, by the expenditure of time or money, contribute to a reclamation of the lost property.") And see Nicholson *v.* Chapman, 1793, 2 H. Bl. 254, 258, (A quantity of timber belonging to the plaintiff was placed in a dock on the bank of a navigable river. The timber was accidentally loosened, carried by the tide to a considerable distance, and left at low water upon a towing path. The defendant found it in that situation and voluntarily conveyed it to a place of safety beyond the reach of the tide at high water. Nicholson made a demand upon Chapman for its delivery, but this the latter refused to do unless compensated for his services in saving and keeping the timber. Nicholson then brought action in trover, and while it was held that Chapman had no lien on the timber and consequently no right to withhold it from the owner, Lord Chief Justice EYRE intimated that reasonable compensation for Chapman's services might be recovered by him in a suitable action. "A court of justice," he declared, "would go as far as it could go, towards enforcing payment."); Amory *v.* Flyn, 1813, 10 Johns. (N. Y.) 102; 6 Am. Dec. 316, (in which it is said that a finder is entitled to recover only necessary expenses in preserving the property). But see, *contra*, Watts *v.* Ward, 1854, 1 Or. 86; 62 Am. Dec. 299.

By § 1867 of the Civil Code of California, it is provided that "the finder of a thing is entitled to compensation for all expense necessarily incurred by him in its preservation, and for any other service necessarily performed by him about it, and to a reasonable reward for keeping it." See to the same effect: Massachusetts Revised Laws, 1902, ch. 94, s. 4; Missouri Annotated Statutes, 1906, § 8479; North Dakota Revised Codes, 1905, § 5481; Washington, Rem. & Bal. Anno. Codes, 1909, § 7143; Wisconsin Statutes, 1898, § 1616. One who takes up estrays is also entitled to compensation by statute. See Cummings *v.* Ellis, 1909, 140 Mo. App. 102; 119 S. W. 512; Illinois Revised Stat-

Beckwith v. *Frisbie*, 1860, 32 Vt. 559: Action to recover money paid by the plaintiff, owner of a cargo of oats, to the defendants, owners of a canal boat, for storage of the cargo. In the course of carriage the boat was caught by unexpected cold weather and frozen in the canal, where she was obliged to lie all winter. It was necessary for the safety of the boat and cargo that the oats should be removed and stored for the winter. The defendants procured this to be done, and having paid for the storage, required reimbursement from the plaintiff, who in order to get his goods complied with the demand. ALDIS, J. (p. 568): "It is expense bestowed on the plaintiff's property and for his benefit; it preserves his property, but it does not aid the defendant's interest, which was simply to transport the cargo to New York. We think that equity between these parties requires that this expense should be borne by the plaintiff. And if he was so liable in equity he could not shift the burden on to the defendants by refusing to pay what it was his duty to pay. The law raises an implied promise on his part to pay the defendants for what they might be obliged to expend in preserving his property, when that duty was thrown upon them by their having his property in their care as carriers, and were prevented from completing their contract by an act of Providence. If he has paid it he cannot recover it back." [1]

utes, 1908, ch. 50, s. 7; Massachusetts Revised Laws, 1902, ch. 94, s. 7; Minnesota Revised Laws, 1905, § 2772; Ohio, Bates Anno. Statutes, 1908, § 6633; Wisconsin Statutes, 1898, § 1611.

[1] *Accord:* Preston *v.* Neale, 1858, 12 Gray (Mass.) 222, 224, (Action by a landlord, not an innkeeper, for storage of chattels left by an outgoing tenant. Held, that the landlord had no lien on the goods, but was entitled to reasonable compensation for storage. Said METCALF, J.: "There is also an ancient authority on this point, to wit, Doctor and Student, c. 51, where is this passage: 'Though a man waive the possession of his goods and saith he forsaketh them, yet by the law of the realm the property remaineth still in him, and he may seize them after when he will. And if any man in the meantime put the goods in safeguard to the use of the owner, I think he doth lawfully, and that he shall be allowed for his reasonable expenses in that behalf, as he shall be of goods found; but he shall have no property in them, no more than in goods found.'"); Moline, etc., Co. *v.* Neville, 1897, 52 Neb. 574; 72 N. W. 854, (action by owner of building for storage of goods which had been part of stock of lessee). And see Great Northern R. Co. *v.* Swaffield, 1874, L. R. 9 Exch. 132.

In re Bryant's Estate, 1897, 180 Pa. St. 192; 36 Atl. 738: Claim of one Lodge for services. MITCHELL, J. (p. 195): "It appears that for several years before the death of Capt. Bryant, Lodge was his man of business for the collection of rents and the management of his real estate, as well as his confidential adviser in other matters. The sudden death of Capt. Bryant without known heirs left Lodge in charge and quasi possession as an agent without a known principal, and therefore with at least a moral duty to look after the property for the real owner, whoever he might prove to be. This duty the orphans' court found that he had performed in good faith, and was entitled to be compensated for. . . . As a result of further consideration of this subordinate part of the case, we are not satisfied that the learned court below committed any error in holding that Lodge had rendered services to the estate for which he was entitled to be compensated, and in fixing the amount." [1]

It is noticeable that in practically all of the cases in which a recovery has been allowed, the plaintiff was either a finder of the property preserved, or a custodian or bailee. This suggests that the right to compensation may grow out of a special interest in the property. But, upon principle, such an interest does not appear to be essential.

§ 208. (7) **Repairs by a cotenant.** — If a tenant in common or joint tenant of a building makes repairs or alterations without the knowledge or against the wishes of his cotenant, the latter is obviously under no contractual obligation to contribute to the expense. Moreover, since one is not ordinarily required by law to preserve his property, it cannot be contended that the tenant who makes the repairs is in the position of one who confers a benefit upon another under compulsion. If a quasi contractual obligation to contribute is to be recognized at all, it must be upon the theory that the interest of the tenant who makes the repairs calls for such an intervention in his co-

[1] *Cf.* Mathie *v.* Hancock, 1906, 78 Vt. 414; 63 Atl. 143, in which one who, after the death of his employer, furnished feed for and exercised his horses until they were taken possession of by the administrator, was not allowed to recover.

tenant's affairs as may be necessary to save the property from destruction or decay.

At the early common law, a tenant in common or joint tenant of a house or mill, who regarded certain repairs as necessary for the preservation of the property, could bring his dissenting cotenant into court by the writ *de reparatione faciendâ* and have the reasonableness of the proposed repairs determined, and the obligation of the cotenant fixed. Coke, in his commentary on Littleton,[1] stated the doctrine as follows:

"If two tenants in common, or joint tenants, be of an house or mill, and it fall in decay, and the one is willing to repaire the same, and the other will not, he that is willing shall have a writ *de reparatione faciendâ*, and the writ saith *ad reparationem et sustentationem ejusdem domûs teneantur*, whereby it appeareth that owners are in that case bound *pro bono publico* to maintain houses and mills which are for habitation and use of men."[2]

This seems to have been the only method by which a cotenant could be compelled to pay his share of the expense. To make the repairs first and then sue the cotenant for contribution was not permitted.

The writ *de reparatione* appears to have been rarely used — probably because in case of controversy between cotenants partition is the most natural and satisfactory remedy — and is now obsolete.[3] It has been suggested in several cases that if a cotenant is requested to join in making repairs and refuses

[1] Coke Lit. 200 b.

[2] And see Bowles's Case, 1616, 11 Coke 79 b, 82 b; Cooper *v.* Brown, 1909, 143 Ia. 482; 122 N. W. 144; 136 Am. St. Rep. 768; Kent, "Commentaries," Vol. 4, p. 370. In Leigh *v.* Dickeson, 1883, 12 Q. B. D. 194, 197, Baron POLLOCK said: "It is curious to observe that the remedy between the joint tenants is spoken of as if it was one which existed rather for the benefit of the community than of the joint tenants." A statute in Wisconsin makes joint owners of milldams, etc., liable for the expense of necessary repairs. Clark *v.* Plummer, 1872, 31 Wis. 442.

[3] In Ward *v.* Ward's Heirs, 1895, 40 W. Va. 611; 21 S. E. 746; 29 L. R. A. 449; 52 Am. St. Rep. 911, BRAMMAR, J., said: "I have no doubt this old common law writ, though disused, might yet be resorted to."

so to do, that "an action for the money expended" might be used in its place,[1] but it has been held, on the contrary, that an action at law for that purpose will not lie.[2] In a suit for partition, however, a court of equity will, in a proper case, give its relief upon condition of an allowance for necessary repairs and improvements,[3] and in a Kentucky case [4] it was held that, without partition, one half the cost of repairs made by one tenant to which the other refused to contribute might be made a lien upon the income from the portion of the delinquent.

The remedy by writ *de reparatione* did not extend to the case of repairs by the owner in severalty of part of a building.

[1] Leigh *v.* Dickeson, 1883, 12 Q. B. D. 194; Cooper *v.* Brown, 1909, 143 Ia. 482; 122 N. W. 144; Doane *v.* Badger, 1815, 12 Mass. 65; Stevens *v.* Thompson, 1845, 17 N. H. 103; Mumford *v.* Brown, 1826, 6 Cow. (N. Y.) 475; 16 Am. Dec. 440; Dech's Appeal, 1868, 57 Pa. St. 467, 472. And see Haven *v.* Mehlgarten, 1857, 19 Ill. 91; Beaty *v.* Bordwell, 1879, 91 Pa. St. 438. In Leigh *v.* Dickeson, *supra*, which was an action for use and occupation by one tenant in common against another, with a counterclaim for money expended in repairs, Baron POLLOCK said (p. 196): "No case or authority was cited by counsel to shew that going back for a long period of years effect has ever been given by the Courts to a claim by action by one tenant in common against another for money which had been expended upon the repair of their common property, nor have I been able to find any such case or authority, although the claim deals with a matter of common occurrence, and the question must often have arisen if the defendant's contention be correct. It becomes necessary, therefore, to refer to the older law, and to see upon what principle any claim of a like nature has been rested, and how far, if at all, it would govern a case like the present." After discussing the writ *de raparatione faciendâ*, he concluded that the principle underlying it had no application to the case at bar, because the repairs for which contribution was claimed were not such as were necessary to prevent the house from going to ruin.

[2] Calvert *v.* Aldrich, 1868, 99 Mass. 74; 96 Am. Dec. 693. And see Merchants' Bank *v.* Foster, 1900, 124 Ala. 696; 27 So. 513, (party wall).

[3] Swan *v.* Swan, 1819, 8 Price 518; Drennen *v.* Walker, 1860, 21 Ark. 539; McDearman *v.* McClure, 1876, 31 Ark. 559; Hall *v.* Piddock, 1871, 21 N. J. Eq. 311; Ford *v.* Knapp, 1886, 102 N. Y. 135; 6 N. E. 283; 55 Am. Rep. 782; Cosgriff *v.* Foss, 1897, 152 N. Y. 104; 46 N. E. 307; 36 L. R. A. 753; 57 Am. St. Rep. 500; Ward *v.* Ward's Heirs, 1895, 40 W. Va. 611; 21 S. E. 746; 29 L. R. A. 449; 52 Am. St. Rep. 911.

[4] Hotopp *v.* Morrison Lodge, 1901, 110 Ky. 987; 23 Ky. Law Rep. 418; 63 S. W. 44.

And it has consequently been held that where the owner of the upper part of a house makes necessary repairs to the roof, he cannot, by an action of assumpsit, enforce contribution from the owner of another part.[1] It has been intimated, however, that equity might afford relief,[2] and the case of *Campbell* v. *Mesier*,[3] in which Chancellor KENT held that one who rebuilt a decayed party wall was entitled to contribution from the owner of the adjoining house, is closely analogous.

§ 209. (8) **Performance of another's contractual duty.** — The prompt discharge of a contractual obligation is not ordinarily a matter of grave public concern. As a rule, therefore (see *ante*, § 194), the default of a contractor will not warrant the intervention of a stranger to the contract.[4] But if one contracts to support a person who by reason of age or disability is dependent upon the performance of the contract for the necessaries of life, and then refuses to furnish the support, intervention by an appropriate person (see *ante*, § 196), at least until damages for the breach of contract can be collected, would seem to be dutiful. It was accordingly held, in a New York case,[5] that the value of support so furnished might be recovered from the contractor, the court relying chiefly on the analogy to the case of necessaries furnished to a wife or infant child for whom the husband or father improperly neglects or refuses to provide (see *ante*, § 203). In a Maine case,[6] on the other hand, a recovery was denied upon the ground that a person entitled by contract to support, unlike a wife or child, "may in his own name, enforce his rights, and obtain the means of fulfilling his own contracts with others." That he

[1] Loring *v.* Bacon, 1808, 4 Mass. 575. And see Cheeseborough *v.* Green, 1834, 10 Conn. 318; 26 Am. Dec. 396; Wiggin *v.* Wiggin, 1862, 43 N. H. 561; 80 Am. Dec. 192.

[2] Cheeseborough *v.* Green, 1834, 10 Conn. 318; 26 Am. Dec. 396.

[3] 1820, 4 Johns. Ch. (N. Y.) 334; 8 Am. Dec. 570.

[4] See Johnson *v.* Boston, etc., R. Co., 1897, 69 Vt. 521; 38 Atl. 267.

[5] Forsyth *v.* Ganson, 1830, 5 Wend. (N. Y.) 558; 21 Am. Dec. 241. And see Rundell *v.* Bentley, 1889, 53 Hun 272; 6 N. Y. Supp. 609.

[6] Moody *v.* Moody, 1837, 14 Me. 307, 309. And see Matheny *v.* Chester, 1911, 141 Ky. 790; 133 S. W. 754; Savage *v.* McCorkle, 1888, 17 Or. 42; 21 Pac. 444.

may enforce his own rights is true, but the enforcement of rights requires more or less time, and meanwhile he must be provided with the necessaries of life.

§ 210. (9) **Performance of another's statutory duty to repair roads.** — In the recent and interesting English case of *Macclesfield Corporation* v. *Great Central Railway Company*,[1] it was held that the district highway authorities could not recover expenses incurred in repairing a bridge roadway which the defendant, in violation of its statutory duty, refused to repair. Said KENNEDY, L.J.:

"If it could have been shewn that the plaintiffs were legally compellable to do the work, I should say that, having been compelled to do something which the railway company ought to have done, the plaintiffs might recover; but the authorities, as Farwell, L.J., has pointed out, are clear to shew that it would be a sufficient defence in a case of this kind, were proceedings taken against the local authority for non-repair of the roadway passing over the bridge, to shew that Parliament by this private Act in a section which, so far as regards the portion with which we are concerned, has to be construed for the public benefit, not for the benefit merely of an individual or a set of private individuals, has ordered that the repair is to be done by the company. In such a case it could have been pleaded as a defence to proceedings against the local authority that the burden had been thrown upon another body, and therefore the common law liability had been, as it were, extinguished by the will of Parliament. Not being under a statutory obligation to pay for or to do the work, this local authority has done the work and incurred expense in doing it, and I do not know the legal principle upon which in those circumstances they can throw the burden upon some one else who ought in the first instance to have done the work, and who therefore is in a position to say, 'You who seek to recover this payment from me have acted as volunteers.'"

This decision, it is respectfully submitted, is erroneous. All of the elements of quasi contractual obligation were present (see *ante*, § 193). The defendant's duty was one the prompt

[1] [1911] 2 K. B. 528, 540; 104 L. T. R. 728, 736.

performance of which was a matter of public concern; the plaintiffs were eminently the proper persons to intervene; the defendants had been requested to perform their duty and had refused so to do. The fact that the plaintiffs acted *voluntarily*, in the sense that there was neither mistake nor compulsion, did not justify the denial of relief, as all of the cases in which dutiful intervention has been held to raise an obligation testify.

PART III

BENEFITS CONFERRED UNDER CONSTRAINT

CHAPTER XV

CONSTRAINT OF DURESS

§ 211. In general.
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§ 213. (II) Sundry instances of obligation, classified according to means of compulsion employed:
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§ 215. (2) Threat of legal proceedings.
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§ 218. (5) Injury to business.
§ 219. (6) Oppressive refusal to discharge a duty:
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§ 223. Same: Right to recover usury: Upon principle.
§ 224. Same: Right to recover from assignee of usurer.
§ 225. Same: Right to recover before principal and legal interest are paid.
§ 226. Same: Right of debtor to have usurious interest applied in diminution of principal.
§ 227. Same: Recovery of usurious interest under National Bank Act.

§ 211. **In general.** — As a matter of logical analysis, the obligation to restore a benefit conferred under compulsion exercised by the defendant should be regarded, not as a primary quasi contractual obligation, but as a secondary obligation resulting from the breach of a primary obligation. That is to say, there ought to be recognized a universal obligation not to exercise duress over another to his damage, just as there is not to mislead another to his damage by false representations. For in both cases the duty is essentially the same — to refrain

from injuring another by wrongfully creating a motive for action. If such were the law, the exercise of duress, like that of fraud (see *post*, § 270), would not *create* a primary obligation, but would *violate* a preëxisting primary obligation — in other words would not give rise to a quasi contract but would constitute a tort — and the resulting right of the injured party to restitution as well as his right to damages, would be secondary or remedial.

As a matter of fact, while obtaining goods or money by the exercise of actual force against the owner has been held a trespass, the accomplishment of the same purpose by threat or menace or by any milder form of compulsion has not been recognized as a tort. In the light of the law of deceit, false imprisonment by threats of force, and the procurement, by threats of force, of a refusal to contract, the omission is remarkable. It is in large measure due, probably, to the notion that the fact of *consent* (though improperly obtained) effects a transfer of title and thus absolves the transferee from the charge of violating a property right.

Although failing to recognize the obtainment of goods or money by duress (short of actual force) as a tort, the courts were of course not blind to the fact that the retention, without compensation, of goods or money so obtained may be unjust. In the course of time, therefore, the convenient remedy of assumpsit was granted. And since the obligation to make restitution is obviously not contractual in character, but rests solely upon the injustice (which must appear[1]) of permitting the retention of the benefit so obtained, it is properly treated as quasi contractual.

§ 212. (I) **What constitutes duress.** — The legal conception of duress, originally so narrow as to apply only to cases of imprisonment or serious violence to the person, or threats of such imprisonment or violence,[2] has gradually expanded under the influence of equity, until it is now commonly said to consist of any actual or threatened unlawful exercise of power possessed, or believed to be possessed, by one party over the person or

[1] Koenig *v.* People's Gas, etc., Co., 1910, 153 Ill. App. 432.
[2] Skeate *v.* Beale, 1841, 11 Ad. & El. 983.

property of another, from which the latter has no other means of immediate relief than the performing of the required act.[1] Indeed it is becoming increasingly difficult, because of the adoption of equitable doctrines in common law courts and the confusion, in many jurisdictions, of legal and equitable procedure, to distinguish duress from what in equity is called undue influence.[2] But it is unnecessary here to attempt a very precise definition of the bounds of either. It need only be said that upon principle any species of compulsion that would make a contract voidable, either at law or in equity, should be enough to support an action to recover the value of a benefit conferred thereunder.

§ 213. (II) **Sundry instances of obligation classified according to means of compulsion employed.** — The cases in which restitution is most commonly sought may be classified, according to the means of compulsion employed, as follows:

(1) Violence to the person or imprisonment — commonly called duress of person.

(2) Threat of legal proceedings.

(3) Seizure or detention of personal property — commonly called duress of goods.

(4) Assertion of fictitious lien on real property or refusal to discharge valid lien.

(5) Injury to business.

(6) Oppressive refusal to discharge a duty.

(7) Oppressive refusal to loan money at a legal rate of interest.

They will be considered in the above order.

§ 214. (1) **Violence or imprisonment: Duress of person.** — It is familiar law that money paid under constraint of actual or threatened physical harm, either to the plaintiff himself or to a member of his family, may be recovered.[3] The same is true of

[1] See Harriman, "Contracts," § 445 and cases cited; Joannin *v.* Ogilvie, 1892, 49 Minn. 564; 52 N. W. 217; 16 L. R. A. 376; 32 Am. St. Rep. 581.

[2] See Galusha *v.* Sherman, 1900, 105 Wis. 263; 81 N. W. 495; 47 L. R. A. 417.

[3] Harmon *v.* Harmon, 1873, 61 Me. 227; 14 Am. Rep. 556.

money paid under constraint of actual or threatened unlawful imprisonment.[1] And, notwithstanding frequent statements to the effect that the imprisonment must be unlawful,[2] it seems the better rule that to take advantage of a lawful imprisonment or of threats of lawful imprisonment for the purpose of furthering one's private ends is duress.[3] Money so extorted may therefore be recovered.[4]

§ 215. (2) **Threat of legal proceedings.** — The commencement of an action, as will be seen in the next chapter (*post*, § 228), does not constitute duress. *A fortiori*, a threat of civil process is not duress and money paid or other benefits conferred because of such a threat may not be recovered.[5]

[1] Cadaval *v.* Collins, 1836, 4 Ad. & E. 858; Foss *v.* Whitehouse, 1901, 94 Me. 491; 48 Atl. 109; Cribbs *v.* Sowle, 1891, 87 Mich. 340; 49 N. W. 587; 24 Am. St. Rep. 166; Fossett *v.* Wilson, 1881, 59 Miss. 1; Adams *v.* Irving Nat. Bank, 1889, 116 N. Y. 606; 23 N. E. 7; 6 L. R. A. 491; 15 Am. St. Rep. 447; Landa *v.* Obert, 1890, 78 Tex. 33; 14 S. W. 297.

[2] See Plant *v.* Gunn, 1874, 2 Woods (U. S. C. C.) 372; Fed. Cas., No. 11,205; Hatter *v.* Greenlee, 1834, 1 Port. (Ala.) 222; 26 Am. Dec. 370; Bailey *v.* Devine, 1905, 123 Ga. 653; 51 S. E. 603; 107 Am. St. Rep. 153; McCormick, etc., Co. *v.* Miller, 1898, 54 Neb. 644; 74 N. W. 1061; Dunham *v.* Griswold, 1885, 100 N. Y. 224; 3 N. E. 76.

[3] Williams *v.* Bayley, 1866, L. R. 1 H. L. 200; Hartford Fire Ins. Co. *v.* Kirkpatrick, 1896, 111 Ala. 456; 20 So. 651; Morrill *v.* Nightingale, 1892, 93 Cal. 452; 28 Pac. 1068; 27 Am. St. Rep. 207; Burton *v.* McMillan, 1907, 52 Fla. 469; 42 So. 849; 8 L. R. A. (N. S.) 990; 120 Am. St. Rep. 220; Morse *v.* Woodworth, 1892, 155 Mass. 233; 27 N. E. 1010; 29 N. E. 525; Hensinger *v.* Dyer, 1898, 147 Mo. 219; 48 S. W. 912; Richardson *v.* Duncan, 1826, 3 N. H. 508; Ball *v.* Ward, 1909, 76 N. J. Eq. 8; 74 Atl. 158; Adams *v.* Irving Nat. Bank, 1889, 116 N. Y. 606; 23 N. E. 7; 6 L. R. A. 491; 15 Am. St. Rep. 447; Phelps & Johnson *v.* Zuschlag, 1870–71, 34 Tex. 371; Gorringe *v.* Reed, 1901, 23 Utah 120; 63 Pac. 902; 90 Am. St. Rep. 692.

[4] Morse *v.* Woodworth, 1892, 155 Mass. 233; 27 N. E. 1010; 29 N. E. 525; Richardson *v.* Duncan, 1826, 3 N. H. 508. And see Heckman *v.* Swartz, 1885, 64 Wis. 48; 24 N. W. 473.

[5] Vick *v.* Shinn, 1887, 49 Ark. 70; 4 S. W. 60; 4 Am. St. Rep. 26, (threat to take possession of property under a mortgage and sell the same); Holt *v.* Thomas, 1894, 105 Cal. 273; 38 Pac. 891, (threat of suit); Paulson *v.* Barger, 1906, 132 Ia. 547; 109 N. W. 1081, (threat to foreclose landlord's lien); Parker *v.* Lancaster, 1892, 84 Me. 512; 24 Atl. 952, (threat of suit); Emmons *v.* Scudder, 1874, 115 Mass. 367, (threat of ejectment); Weber *v.* Kirkendall, 1895, 44 Neb. 766; 63 N. W. 35,

While a threat of imprisonment may constitute duress (*ante*, § 214), a threat of criminal prosecution, when no warrant has been issued and there is no immediate danger of arrest, is not enough to make a payment obtained thereby recoverable.[1] In a series of English cases, however, it has been held that if the sanitary authorities of a district, having the power to impose penalties by summary proceedings, notify a person to abate a nuisance which, under the law, the authorities themselves and not the person notified ought to abate, and the person so notified abates the nuisance in pursuance of the notice, he may recover the cost of the work done as money paid under compulsion.[2] The analogy to cases of taxes and assessments collectible by summary process is obvious (*post*, § 237 *et seq.*).

§ 216. (3) **Seizure or detention of personal property.** — Although there is a lingering doubt as to whether the wrongful seizure or detention of personal property should be regarded as sufficiently compulsive to make a contract secured thereby voidable at law,[3] it has been held from an early day that money

(threat of attachment); Evans *v.* Gale, 1846, 18 N. H. 397, (threat of suit); Peebles *v.* Pittsburg, 1882, 101 Pa. St. 304; 47 Am. Rep. 714, (threat of collection by process of law); Flack *v.* Nat. Bank of Commerce. 1892, 8 Utah 193; 30 Pac. 746; 17 L. R. A. 583, (threat of attachment). And see Mayor, etc., of Baltimore *v.* Lefferman, 1846, 4 Gill (Md.), 425; 45 Am. Dec. 145; C. & J. Michel Brewing Co. *v.* State, 1905, 19 S. D. 302; 103 N. W. 40; 70 L. R. A. 911.

[1] Loan, etc., Assn. *v.* Holland, 1895, 63 Ill. App. 58, 66; Hines *v.* Board of Comm'rs, 1883, 93 Ind. 266, 270; Harmon *v.* Harmon, 1873, 61 Me. 227; 14 Am. Rep. 556; Hilborn *v.* Bucknam, 1886, 78 Me. 482; 7 Atl. 272; 57 Am. Rep. 816; Betts *v.* Village of Reading, 1892, 93 Mich. 77; 52 N. W. 940.

[2] Andrew *v.* St. Olave's Board of Works, [1898] 1 Q. B. 775; North *v.* Walthamstow Urban Council, 1898, 67 L. J., Q. B. 972; Haedicke *v.* Friern Barnet Urban Council, [1904] 2 K. B. 807. *Cf.* Mayor, etc., of Baltimore *v.* Lefferman, 1846, 4 Gill (Md.) 425; 45 Am. Dec. 145.

[3] *That the contract is voidable:* Spaids *v.* Barrett, 1870, 57 Ill. 289; 11 Am. Rep. 10, (perishable goods detained); Bennett *v.* Ford, 1874, 47 Ind. 264, (duress of person and goods); Wilkerson *v.* Hood, 1896, 65 Mo. App. 491, (note given to secure release of mules); Foshay *v.* Ferguson, 1843, 5 Hill (N. Y.) 154, (threat to destroy); Collins *v.* Westbury, 1799, 2 Bay (S. C.) 211; 1 Am. Dec. 643, (seizure of slaves at distance from home); Oliphant *v.* Markham, 1891, 79 Tex. 543; 15 S. W. 569; 23 Am. St. Rep. 363, (note given to secure possession of evidences of

paid to prevent such seizure or detention or to release property so seized or detained may be recovered.[1] This is upon the theory that the immediate possession and enjoyment of property by its owner may be a matter of such importance to him that to deprive him of it, or to threaten to deprive him of it, for the purpose of extorting money from him is a species of compulsion:

Astley v. *Reynolds*, 1731, 2 Strange 916: Action to recover money paid in excess of legal interest to redeem plate pawned to the defendant. The plaintiff at first refused to pay the amount demanded by the defendant, but several months later, the defendant still refusing to give up the goods unless the excessive amount was paid, the plaintiff paid and obtained his goods. *Per Curiam* (p. 916): "We think also, that this is a payment by compulsion; the plaintiff might have such

debt). *Contra:* Skeate *v.* Beal, 1841, 11 Ad. & El. 983, (excessive distress); Hazelrigg *v.* Donaldson, 1859, 2 Metc. (59 Ky.) 445, (wrongful attachment); Bingham *v.* Sessions, 1846, 6 Smed. & M. (14 Miss.) 13, (fraudulent execution); Williams *v.* Phelps, 1862, 16 Wis. 80, (unless "some peculiar and pressing necessity").

[1] Astley *v.* Reynolds, 1731, 2 Strange 915, (payment to redeem pawned plate); Irving *v.* Wilson, 1791, 4 Term R. 485, (payment to revenue officer); Ashmole *v.* Wainwright, 1842, 2 Q. B. 837; 2 Gale & Dav. 217, (payment to carrier); Cobb *v.* Charter, 1865, 32 Conn. 359; 87 Am. Dec. 178, (mechanic's chest of tools); DuVall *v.* Norris, 1904, 119 Ga. 947; 47 S. E. 212, (money paid police officer to secure return of stolen ring); Fenwick Shipping Co. *v.* Clarke Bros., 1909, 133 Ga. 43; 65 S. E. 140, (payment to prevent seizure of baggage); Lafayette, etc., R. Co. *v.* Pattison, 1872, 41 Ind. 312, (payment to carrier); Chase *v.* Dwinal, 1830, 7 Greenl. (Me.) 134; 20 Am. Dec. 352, (illegal boomage); Whitlock Mach. Co. *v.* Holway, 1899, 92 Me. 414; 42 Atl. 799, (illegal claim for storage); Chandler *v.* Sanger, 1874, 114 Mass. 364; 19 Am. Rep. 367, (oppressive attachment); Fargusson *v.* Winslow, 1885, 34 Minn. 384; 25 N. W. 942, (illegal lien); Quinnett *v.* Washington, 1846, 10 Mo. 53, (wrongful distress); Baldwin *v.* Liverpool, etc., S. S. Co., 1878, 74 N. Y. 125; 30 Am. Rep. 277, (payment to carrier); Clancy *v.* Dutton, 1908, 129 App. Div. 23; 113 N. Y. Supp. 124, (payment to carrier); Cowley *v.* Fabien, 1912, N. Y. ; 97 N. E. 458; Marsh *v.* Port Harbour Co., 1841, 6 U. C. Q. B. (O. S.) 100, (excessive toll); Alston *v.* Durant, 1847, 2 Strob. L. (S. C.) 257; 49 Am. Dec. 596, (excessive fees by sheriff); Buford *v.* Lonergan, 1889, 6 Utah 301; 22 Pac. 164; *aff.* Lonergan *v.* Buford, 1893, 148 U. S. 581; 13 S. Ct. 684, (oppressive refusal to deliver cattle under contract).

an immediate want of his goods, that an action of trover would not do his business: where the rule *volenti non fit injuria* is applied, it must be where the party had his freedom of exercising his will, which this man had not; we must take it he paid the money relying on his legal remedy to get it back again."

Cobb v. *Charter*, 1865, 32 Conn. 358; 87 Am. Dec. 178: McCURDY, J. (p. 366): "The plaintiff was a mechanic. His chest of tools, which are held by statute sacred even from the touch of a creditor, were seized by the defendant. He refused to deliver them to the owner on demand except upon his paying, without the slightest obligation, the debt of another person. The plaintiff was thus deprived of the means of his support. Thereupon he left the money with Stratton to be paid to the defendant when the chest should be sent. Stratton so informed the defendant, who at once sent the chest and then received the money. In view of such extortion, oppression and taking an undue advantage of the plaintiff's situation, it seems somewhat bold in the defendant to come into a court of justice and assert that the payment was voluntary."

Qualifications of the rule have occasionally been made. For example, it has been held that money paid to obtain the release of goods distrained cannot be recovered if the goods might have been replevied by the plaintiff.[1] Again, it has been suggested that the retention of the goods by the defendant must appear to be "fraught with great immediate hardship or irreparable injury."[2] But in most of the modern cases no

[1] Lindon *v.* Hooper, 1776, 1 Cowp. 414, (wrongful distress); Knibbs *v.* Hall, 1794, 1 Esp. 84, (wrongful distress); Colwell *v.* Peden, 1834, 3 Watts (Pa.) 327, (wrongful distress). And see Chase *v.* Dwinal, 1830, 7 Greenl. (Me.) 134; 20 Am. Dec. 352, (illegal boomage); Harmony *v.* Bingham, 1854, 12 N. Y. 99; 62 Am. Dec. 142, (carrier); Peebles *v.* City of Pittsburg, 1882, 101 Pa. St. 304; 47 Am. Rep. 714, (unconstitutional assessment). But see, *contra*, Green *v.* Duckett, 1883, 11 Q. B. D. 275, (wrongful distress); Quinnett *v.* Washington, 1846, 10 Mo. 53, (wrongful distress).

[2] See Cobb *v.* Charter, 1865, 32 Conn. 358, 365; 87 Am. Dec. 178; Fargusson *v.* Winslow, 1885, 34 Minn. 384, 386; 25 N. W. 942, ("circumstances of hardship or serious inconvenience"); Joannin *v.* Ogilvie, 1892, 49 Minn. 564, 567; 52 N. W. 217; 16 L. R. A. 376; 32 Am. St. Rep. 581, ("serious loss or great inconvenience").

limitation whatever is recognized. The doctrine has been applied to the unlawful seizure or detention not only of chattels, but of bonds, deeds, insurance policies, and negotiable instruments.[1]

Analogously, it was held in an early New York case,[2] that the wrongful refusal by a corporation to transfer certain shares of stock on its books unless the buyer of the shares paid a debt from the seller to the corporation, was such duress as entitled the buyer, who yielded to the demand in order to secure the transfer of his stock, to recover the amount paid. "The equitable extension of this kind of action," said the court, "has of late been so liberal, that it will lie to recover money obtained from any one, by extortion, imposition, oppression, or taking an undue advantage of his situation. In the present case, there was, at least, an undue advantage taken of the plaintiff's situation." In a comparatively recent Pennsylvania case,[3] on the other hand, the court declined to extend the doctrine to the refusal by a corporation to allot a certain number of shares of a new issue to a stockholder who had the right, by law, to subscribe for them at par, unless he paid an additional sum "for the privilege of buying." Said Chief Justice PAXSON: "It is not pretended that there was a duress of person, nor was there anything to show duress of goods. There was nothing but the

[1] Shaw *v.* Woodcock, 1827, 7 Barn. & Cress. 73, (policies); Close *v.* Phipps, 1844, 7 Man. & G. 586, (deeds); Wakefield *v.* Newbon, 1844, 6 Q. B. 276, (deeds); Oates *v.* Hudson, 1851, 6 Exch. 346, (deeds): Pemberton *v.* Williams, 1877, 87 Ill. 15, (deed); McCabe *v.* Shaver, 1888, 69 Mich. 25; 36 N. W. 800, (draft); Bates *v.* N. Y. Ins. Co., 1802, 3 Johns. Cas. (N. Y.) 238, (money paid to secure transfer of stock on company's books); Scholey *v.* Mumford, 1875, 60 N. Y. 498, (bonds; case came before Court of Appeals again in 72 N. Y. 578 and was decided on slightly different grounds); Gould *v.* Farmers' Loan, etc., Co., 1880, 23 Hun (N. Y. Sup. Ct.) 322, (stocks and bonds); Motz *v.* Mitchell, 1879, 91 Pa. St. 114, (deed); Lowenstein *v.* Bache, 1910, 41 Pa. Super. Ct. 552, (securities); Lovejoy *v.* Lee, 1862, 35 Vt. 430, (bank bills).

[2] Bates *v.* N. Y. Ins. Co., 1802, 3 Johns. Cas. (N. Y.) 238, 239.

[3] De la Cuesta *v.* Insurance Co., 1890, 136 Pa. St. 62, 82; 20 Atl. 505; 9 L. R. A. 631. See, in appendix to 136 Pa., the opinion of HARE, P.J., of the court of Common Pleas, in Dawson *v.* Ins. Co., which was argued in the Supreme Court with De la Cuesta *v.* Ins. Co.

denial of a right, and a declared intention not to recognize a right is not duress."

These two cases, though strongly resembling each other, seem fairly distinguishable. In the former, the defendant, by refusing to transfer the shares on its books, practically withheld from the plaintiff specific stock which he had purchased from a third person and of which he was already the equitable owner;[1] in the latter, the defendant withheld nothing that belonged in any sense to the plaintiff but simply refused to perform for his benefit a duty imposed upon it by law. In a word, it is the difference between a detention of property and a refusal to perform an obligation. Both cases, however, lie close to the frontier of duress, for under some circumstances a mere refusal to perform an obligation has been held sufficiently coercive to raise an obligation to repay money extorted thereby (see *post*, §§ 219, 220).

§ 217. (4) **Assertion of fictitious lien on real property or refusal to discharge valid lien.**— Upon the same principle as governs cases of the seizure or detention of personal property (*ante*, § 216), money extorted by the assertion of a fictitious or invalid lien upon real property or by a wrongful refusal to discharge a valid lien has been held recoverable.[2] In this

[1] See Pemberton *v.* Williams, 1877, 87 Ill. 15. In this case the defendant had sold land to the plaintiff's assignor and had given him a title bond. After several payments had been made upon the purchase price the plaintiff contracted to sell the land to another who demanded to see the deed from the defendant. In order to get a deed the plaintiff was required by the defendant to pay more than was due. It was held in an action to recover the excess that the question whether or not the money was paid under duress should have been left to the jury.

[2] Fraser *v.* Pendlebury, 1861, 31 L. J. C. Pl. 1, (refusal to assign mortgage unless improper demand for costs satisfied); Rowland *v.* Watson, 1906, 4 Cal. App. 476; 88 Pac. 495, (refusal to release lien unless excessive demand paid); Joannin *v.* Ogilvie, 1892, 49 Minn. 564; 52 N. W. 217; 16 L. R. A. 376; 32 Am. St. Rep. 581, (filing of mechanic's lien based upon an unfounded claim); Fout *v.* Giraldin, 1895, 64 Mo. App. 165, (refusal to cancel mortgage unless illegal demand satisfied); Wells *v.* Adams, 1901, 88 Mo. App. 215, (refusal to cancel mortgage unless bonus paid); First Nat. Bank *v.* Sargeant, 1902, 65 Neb. 594; 91 N. W. 595; 59 L. R. A. 296, (excessive amount paid to secure release of mortgage); Kilpatrick *v.* Germania Life Ins. Co., 1905, 183 N. Y. 163; 75 N. E.

case, however, since there is ordinarily no interference with the owner's possession and enjoyment of the property, he should be required to prove, either that the lien constituted a cloud on title, or that special circumstances — such as the necessity of borrowing money on the security of the land — made the immediate lifting of the lien, whether a technical cloud on title or not, a matter of grave importance.[1]

Whether money paid to prevent the wrongful foreclosure of a mortgage may be recovered depends, in large measure, upon the nature of the foreclosure proceedings. If it is a judicial foreclosure that is instituted or threatened, and the owner will therefore have his day in court before his property

1124; 111 Am. St. Rep. 722, (excessive amount paid to secure release of mortgage). *Contra:* Savannah Savings Bank *v.* Logan, 1896, 99 Ga. 291; 25 S. E. 692, (payment of installments not yet due to secure release of mortgage). And see Hipp *v.* Crenshaw, 1884, 64 Ia. 404; 20 N. W. 492, (payment of judgment appealed from in order to borrow money on land upon which judgment was lien; held voluntary); Williamson *v.* Cole, 1875, 26 Oh. St. 207, (usurious interest paid to secure a reconveyance; held voluntary).

[1] In Joannin *v.* Ogilvie, 1892, 49 Minn. 564, 570; 52 N. W. 217; 16 L. R. A. 376; 32 Am. St. Rep. 581, the plaintiff paid off an invalid mechanic's lien in order that he might consummate a loan upon the property and thereby discharge pressing debts. Said MITCHELL, J.: "But while the filing of the lien did not interfere with the defendant's possession of the land, yet it as effectually deprived him of the use of it for the purpose for which he needed it as would withholding the possession of chattel property." See also Wells *v.* Adams, 1901, 88 Mo. App. 215, 225, where the court said: "The case here is that the defendants 'held the plaintiff by the wrists' — they had a large encumbrance on his lands. He was being pressed by other creditors and unless he could secure a release of the defendants' incumbrance, and thus be enabled to make a disposition of the property, he was likely to become a bankrupt, or, at least, suffer a great sacrifice and loss of his property. In order to extricate himself from this embarrassing situation he must have his property disencumbered, and this could be accomplished only by the payment of the defendants' illegal exaction. He was practically confronted with the question whether or not he should pay the defendants the amount exacted, or suffer the serious consequences to be reasonably apprehended from a refusal to do so. The payment under such circumstances, it seems to us, would be under an urgent necessity — under a kind of moral duress. Duress may be shown with respect to real property as well as personal so as to render payment on account of it involuntary and permit it to be recovered back."

can be sold, the payment can hardly be said to be made under coercion.[1] But if it is a summary foreclosure — as by advertisement and sale under a power contained in the mortgage — duress may reasonably be inferred. In the latter case, by the weight of authority, money paid to stop the proceedings, either by the owner or by a subsequent mortgagee, may be recovered.[2]

§ 218. (5) **Injury to business.** — Closely resembling cases of seizure or detention of property (*ante*, § 216) are those of actual or threatened serious injury to business or employment. To imperil a man's livelihood, his business enterprises, or his solvency, is ordinarily quite as coercive as to detain his property. It is manifestly impossible, however, to frame a test whereby to determine precisely what the nature or extent of the injury or interference must be in order to constitute duress. Each case must be judged in the light of its peculiar circumstances. The courts have recognized this, and have generally dealt with the subject in a commendable spirit of liberality. Threats of expulsion or suspension from a labor union;[3] taking steps to prevent the collection of money due from other persons;[4]

[1] Vereycken *v.* Vandenbrooks, 1894, 102 Mich. 119; 60 N. W. 687.

[2] Close *v.* Phipps, 1844, 7 Man. & G. 586; Whitcomb *v.* Harris, 1897, 90 Me. 206; 38 Atl. 138; Cazenove *v.* Cutler, 1842, 4 Metc. (Mass.) 246; McMurtie *v.* Keenan, 1872, 109 Mass. 185; Klein *v.* Bayer, 1890, 81 Mich. 233; 45 N. W. 991; Bennett *v.* Healey, 1861, 6 Minn. 240. And see Joannin *v.* Ogilvie, 1892, 49 Minn. 564; 52 N. W. 217; 16 L. R. A. 376; 32 Am. St. Rep. 581. But see, *contra*, Wessel *v.* Johnston Land Co., 1893, 3 N. D. 160; 54 N. W. 922; 44 Am. St. Rep. 529; Burke *v.* Gould, 1894, 105 Cal. 277; 38 Pac. 733.

[3] Fuerst *v.* Musical, etc., Union, 1905, 95 N. Y. Supp. 155, 160 (City Ct., Tr. T.). The court said: "Plaintiff knew that before he could appeal to the courts for relief he must exhaust the remedies provided by the laws of the organization, and to prosecute the appeal therein allowed he was compelled to pay the amount of the fine. This he did on the last day allowed, but accompanied the payment with his written protest. He feared that if he did not pay the money on that day, the president's threat would become effective and his means of earning a livelihood in his chosen occupation destroyed. That threat, coupled with the fear induced thereby, amounts in law to duress." See also Carew *v.* Rutherford, 1870, 106 Mass. 1; 8 Am. Rep. 287, where the court seemed to regard it as a tort.

[4] Vyne *v.* Glenn, 1879, 41 Mich. 112; 1 N. W. 997.

threats of a business manager, who alone is conversant with important matters, to resign his position;[1] threats of a water company or municipality to cut off the water supply of a factory or commercial building;[2] a refusal on the part of a lessor, whose interest in premises is protected by insurance policies taken out by the lessee, to execute proofs of loss without which the lessee cannot collect his insurance money;[3] all these have been held sufficiently coercive, under particular circumstances, to raise an obligation to repay money wrongfully extorted through their instrumentality.[4]

On the other hand, a wrongful refusal on the part of a brewing company to perform a contract to supply beer to a retailer has been declared not to amount to duress, though the retailer feared that he might have difficulty in obtaining a supply from other brewers.[5] And the same court which held that taking steps to prevent the collection of money due from others is duress decided in a later case that a wrongful refusal to pay

[1] Whitt *v.* Blount, 1906, 124 Ga. 671; 53 S. E. 205. There were also threats, in this case, to keep money, contracts, and property belonging to the persons threatened.

[2] Panton *v.* Duluth Gas and Water Co., 1892, 50 Minn. 175; 52 N. W. 527; 36 Am. St. Rep. 635; Chicago *v.* Northwestern Mut. Life Ins. Co., 1905, 218 Ill. 40; 75 N. E. 803; 1 L. R. A. (N. S.) 770; Westlake *v.* City of St. Louis, 1882, 77 Mo. 47; 46 Am. Rep. 4.

[3] Guetzkow Bros. Co. *v.* Breese, 1897, 96 Wis. 591, 598; 72 N. W. 45; 65 Am. St. Rep. 83, in which the court said: "The plaintiff was in a position where it must obtain its insurance money at once in order to go on with its business and fulfill valuable outstanding contracts, or it would suffer great loss. Under these circumstances it submitted under protest to the unjust demand in order to obtain its own money from the insurance company. This makes a case of legal duress of goods."

[4] See also Lehigh Coal & Nav. Co. *v.* Brown, 1882, 100 Pa. St. 338, and United States *v.* Lawson, 1879, 101 U. S. 164. In the latter case a collector of customs was required by his superior officer, Commissioner of Customs, to turn over fees to the U. S. Treasury. By law he was entitled to keep these fees in addition to his salary. He paid them over and brought suit to recover. CLIFFORD, J.: "Confessedly, the order was official and peremptory, and under such circumstances it may well be inferred the party felt that, if he refused to obey, the refusal would cost him his commission."

[5] Matthews *v* William Frank Brewing Co., 1899, 26 Misc. Rep. 46; 55 N. Y. Supp. 241.

one's own debt under similar circumstances of hardship to the creditor is not [1] — a distinction difficult to appreciate.

Some of the important cases of interference with business have arisen under statutes imposing penalties for the non-payment of taxes. They are considered in another section (*post*, § 242).

§ 219. (6) **Oppressive refusal to discharge a duty**: (*a*) **Illegal fees of public officers.** — Only under circumstances of peculiar hardship — as, for example, where a person's solvency is endangered — will a mere refusal by a private individual to discharge his legal duty to another be held to constitute duress (*ante*, § 218). But in the case of a refusal by a public officer to perform a duty, the courts, recognizing the inherent advantage of his position and the importance of protecting those who deal with him, require no additional evidence that the act is coercive. It is therefore a general rule that illegal or excessive fees exacted by a public officer, *colore officii*, as a condition to the performance of his duty, may be recovered:

Morgan v. *Palmer*, 1824, 2 Barn. & Cr. 729: Assumpsit to recover a fee illegally charged by a mayor for renewing a publican's license. ABBOTT, C.J. (p. 734): "It has been well argued that the payment having been voluntary, it cannot be recovered back in an action for money had and received. I agree that such a consequence would have followed had the parties been on equal terms. But if one party has the power of saying to the other, 'that which you require shall not be done except upon the conditions which I choose to impose,' no person can contend that they stand upon anything like an equal footing. Such was the situation of the parties to this action."

American Steamship Co. v. *Young*, 1879, 89 Pa. St. 186; 33 Am. Rep. 748: Action to recover excessive shipping fees paid to a United States Shipping Commissioner. STERRETT, J. (p. 191): "We think that sound public policy requires us to hold that a public officer who, *virtute officii*, demands and takes as fees for his services, what is not authorized or more than is allowed by law, should be compelled to make restitution. He

[1] Hackley *v.* Headley, 1881, 45 Mich. 569; 8 N. W. 511.

and the public who have business to transact with him do not stand upon an equal footing. It is his special business to be conversant with the law under which he acts, and to know precisely how much he is authorized to demand for his services; but with them it is different. They have neither the time nor the opportunity of acquiring the information necessary to enable them to know whether he is claiming too much or not; and as a general rule, relying on his honesty and integrity, they acquiesce in his demands." [1]

If it appears that the officer's refusal to perform his duty would not have resulted in any injury or hardship to the plaintiff,[2] or that the money sought to be recovered was not paid to the officer until after the expiration of his term of office,[3] restitution will not be enforced. On the other hand it is not a defense that the officer collected the illegal or excessive fee in

[1] Also: Lovell *v.* Simpson, 1800, 3 Esp. 153, (excessive fee charged by sheriff's officer for bail bond); Dew *v.* Parsons, 1819, 2 Barn. & Ald. 562, (sheriff for issuing warrants); Hills *v.* Street, 1828, 5 Bing. 37, (broker holding goods on a distress); Steele *v.* Williams, 1853, 8 Exch. 625, (parish clerk for extracts from records); Ogden *v.* Maxwell, 1855, 3 Blatchf. (U. S. C. C.) 319; Fed. Cas. No 10,458, (collector of port for permission to land baggage); Cook County *v.* Fairbank, 1906, 222 Ill. 578; 78 N. E. 895, (clerk of court for letters testamentary); Clinton *v.* Strong, 1812, 9 Johns. (N. Y.) 370, (clerk of court); Robinson *v.* Ezzell, 1875, 72 N. C. 231, (register of deeds); Hooker *v.* Gurnett, 1858, 16 U. C. Q. B. (Ont.) 180, (clerk for striking special jury); Alston *v.* Durant, 1847, 2 Strobh. (S. C.) 257; 49 Am. Dec. 596, (sheriff for capturing slave); Hays *v.* Stewart, 1852, 8 Tex. 358, (county surveyor for services). And see Laterrade *v.* Kaiser, 1860, 15 La. Ann. 296, (excessive fee demanded by lessee of market house for use of stalls); Marcotte *v.* Allen, 1897, 91 Me. 74; 39 Atl. 346; 40 L. R. A. 185, (illegal fee paid city clerk for burial permits; decision on ground of fraud); Niedermeyer *v.* Curators of the University of Missouri, 1895, 61 Mo. App. 654, (excessive tuition fees paid under protest to the treasurer of State University); Ford *v.* Holden, 1859, 39 N. H. 143, (abated tax paid in order that payer's name might be put on register of voters); Soderberg *v.* King County, 1896, 15 Wash. 194; 45 Pac. 785; 33 L. R. A. 670; 55 Am. St. Rep. 878, (commission illegally retained by sheriff out of proceeds of foreclosure sale).

[2] Taylor *v.* Hall, 1888, 71 Tex. 213; 9 S. W. 141.

[3] Sheibley *v.* Cooper, 1907, 79 Neb. 232, 236; 112 N. W. 363. "It is not a case of official extortion or oppression, but an ordinary transaction between two men dealing on equal terms."

good faith and for the public benefit,[1] or that the money has been turned into the public treasury,[2] although in the latter event the municipality is also liable.[3]

§ 220. (*b*) **Illegal charges of public service corporations.** — Common carriers and some other public service corporations usually enjoy an advantage of position not unlike that of public officers. It is accordingly held that illegal freights, tolls, or other charges exacted by corporations enjoying such an advantage may be recovered as money paid under compulsion:

Great Western R. Co. v. *Sutton*, 1869, L. R. 4 H. L. 226; LORD CHELMSFORD, (p. 263): "Now if the defendants were bound to charge the plaintiff for the carriage of his goods a less sum, and they refused to carry them except upon payment of a greater sum, as he was compelled to pay the amount demanded, and could not otherwise have his goods carried, the case falls within the principle of several decided cases, in which it has been held that money which a party has been wrongfully compelled to pay under circumstances in which he was unable to resist the imposition, may be recovered back in an action for money had and received. In the language of the Court of Common Pleas, in the case of Parker *v.* The Great Western Railway Company [1844, 7 Man. & G. 253], 'the payments made by the plaintiff were not voluntary, but were made in order to induce the company to do that which they were bound to do without them.'" [4]

[1] Steele *v.* Williams, 1853, 8 Exch. 625; Ogden *v.* Maxwell, 1855, 3 Blatchf. (U. S. C. C.) 319; Fed. Cas., No. 10,458; American Steamship Co. *v.* Young, 1879, 89 Pa. St. 186; 33 Am. Rep. 748.

[2] Ogden *v.* Maxwell, 1855, 3 Blatchf. (U. S. C. C.) 319; Fed. Cas., No. 10,458. And see Snowden *v.* Davis, 1808, 1 Taunt. 359; Ripley *v.* Gelston, 1812, 9 Johns. (N. Y.) 201; 6 Am. Dec. 271.

[3] Soderberg *v.* King County, 1896, 15 Wash. 195; 45 Pac. 785; 33 L. R. A. 670; 55 Am. St. Rep. 878.

[4] Also: Parker *v.* Great Western R. Co., 1844, 7 Man. & G. 253; Tutt *v.* Ide, 1855, 3 Blatchf. (U. S. C. C.) 249; Fed. Cas., No. 14,275 *b.*, (detention of goods); Mobile, etc., R. Co. *v.* Steiner, 1878, 61 Ala. 559; Chicago, etc., R. Co. *v.* Chicago, etc., Coal Co., 1875, 79 Ill. 121; Lafayette, etc., R. Co. *v.* Pattison, 1872, 41 Ind. 312; Heiserman *v.* Burlington, etc., R., 1884, 63 Ia. 732; 18 N.W. 903; McGregor *v.* Erie R. Co., 1871, 35 N. J. L. 89; Harmony *v.* Bingham, 1854, 12 N.Y. 99; 62 Am. Dec. 142, (detention of goods); Peters, Rickers & Co. *v.* R. Co.,

In many of the reported cases, as might be expected, conditions of peculiar hardship appear, and to a greater or less extent are emphasized by the court. This does not necessarily mean that in the absence of such conditions relief would not have been granted. But there are a few decisions in which it is insisted that there must always be evidence not only of an illegal demand, but of special circumstances showing "an added element of compulsion."[1] These cases, it is submitted, indicate a failure fully to appreciate the inequality of the normal conditions under which one deals with a public service corporation — an inequality which makes it unnecessary for the corporation to resort to threats and futile for the individual to protest or complain, — as well as the importance, as a matter of public policy, of discouraging the violation of rate laws.[2] The better rule, in the case of public service corporations, as in that of public officers, is that the exaction of the illegal charge is itself sufficiently coercive to raise an obligation to make restitution.

An exception should perhaps be noted where the illegal charge is not demanded by the corporation until the service has been

1884, 42 Oh. St. 275; 51 Am. Rep. 814; Lehigh Coal & Nav. Co. *v.* Brown, 1882, 100 Pa. St. 338; Monongahela Nav. Co. *v.* Wood, 1899, 194 Pa. St. 47; 45 Atl. 73. See Pine Tree Lumber Co. *v.* Chicago, etc., R. Co., 1909, 123 La. 583; 49 So. 202, to the effect that the Interstate Commerce Act has not deprived the shipper of his common law right to restitution.

Where the illegal charge is paid in ignorance of its illegality, restitution might be enforced upon the ground of mistake and without reference to the question of duress. See Evershed *v.* London, etc., R. Co., 1877, 3 Q. B. D. 134, 147. But the mistake is generally one of law, which in most jurisdictions does not constitute a basis for relief.

[1] Arnold *v.* Georgia R. & B. Co., 1873, 50 Ga. 304; Illinois Glass Co. *v.* Chicago Telephone Co., 1908, 234 Ill. 535; 85 N. E. 200; 18 L. R. A. (N. S.) 124; Potomac Coal Co. *v.* Cumberland, etc., R. Co., 1873, 38 Md. 226. And see Killmer *v.* New York, etc., R. Co., 1885, 100 N. Y. 395; 3 N. E. 293; 53 Am. Rep. 194. For an excellent criticism of Illinois Glass Co. *v.* Chicago Telephone Co., *supra*, see 3 Illinois Law Rev. 235.

[2] Statutory penalties, it is true, are generally provided, but they are sometimes inadequate and in any case should not deprive one of his common law right to enforce restitution. Mobile, etc., R. Co. *v.* Steiner, 1878, 61 Ala. 559; Heiserman *v.* Burlington, etc., R. Co., 1884, 63 Ia. 732; 18 N. W. 903.

performed. In such a case the demand can hardly be said to be coercive,[1] unless, as must frequently be true, it creates a fear in the mind of the shipper or consumer that a failure to comply will prejudice his interests in future dealings with the corporation.[2]

§ 221. **Same: Necessity of protest.** — In nearly all of the cases cited in the preceding section the fact that the payment of the illegal charges was made under protest is shown. It is natural, of course, that a protest should be made. And in jurisdictions in which "an added element of compulsion" must be established, the fact of a protest at the time of payment is of evidential value, though not always essential to the plaintiff's case.[3] But where the rule is adopted that the exaction of an illegal charge is itself sufficiently coercive to raise an obligation to make restitution, a protest is superfluous:

Heiseman v. *Burlington, etc., R.*, 1884, 63 Ia. 732; 18 N. W. 903: Beck, J. (p. 736): "Nor need the plaintiff, in a case brought to enforce such an obligation [the obligation to repay excess charges], show objection or protest prior to the payment made in excess of a reasonable compensation. These rules are founded upon the consideration that railroad companies are public carriers, and those who employ them are in their power, and must bow to the rod of authority which they hold over consignors and consignees of property transported by them. . . . The law does not require objection or protest to the

[1] Knudson, etc., Co. *v.* Chicago, etc., R. Co., 1906, 149 Fed. 973; 79 C. C. A. 483; Kenneth *v.* So. Car. R., 1868, 15 Rich. L. (S. C.) 284; 98 Am. Dec. 382. And see Killmer *v.* New York, etc., R. Co., 1885, 100 N. Y. 395; 3 N. E. 293; 53 Am. St. Rep. 194. But see Steele *v.* Williams, 1853, 8 Exch. 625, 631, which was an action to recover fees paid a parish clerk for the privilege of making abstracts from the register of burials and baptisms. The plaintiff's clerk was informed of the amount of the fee before he made the abstracts, but he was not required to pay until afterward. The court allowed a recovery, saying that "it would have been most dishonorable for the party, after having got the extracts, to refuse to pay."

[2] Peters *v.* R. Co., 1884, 42 Oh. St. 275; 51 Am. Rep. 814. And see West Va. Transp. Co. *v.* Sweetzer, 1885, 25 W. Va. 434, 461–2.

[3] Illinois Glass Co. *v.* Chicago Telephone Co., 1908, 234 Ill. 535; 85 N. E. 200; 18 L. R. A. (N. S.) 124.

payment of unjust charges, for the reason that they would be vain, being addressed to those who occupy the commanding position of power to enforce obedience to their requirements." [1]

Under this rule, indeed, the plaintiff's ignorance of the illegality of the charge, at the time of payment, should not prevent a recovery. For one who is compelled to pay a charge, whether it is legal or illegal, has no incentive to question its legality before making payment, and is none the less under compulsion because of his failure so to do.

§ 222. (7) **Oppressive refusal to loan money at legal rate of interest.** — Although it appears to have been held at one time that usurious interest, *i.e.* interest in excess of the rate allowed by law to be charged, could not be recovered,[2] the rule was long ago settled, in England, that assumpsit will lie to recover such interest as money paid under compulsion.[3] In 1854, however, the English usury laws were repealed,[4] and the only relief now afforded the oppressed debtor is that provided by the Money-lenders Act, 1900,[5] which enacts, in substance, that where an action is brought by a person engaged in the business of money lending, and there is evidence which satisfies the court that the interest charged is excessive and that the transaction is harsh and unconscionable, the court may reopen the transaction, relieve the debtor from the payment of any sum in excess of that fairly and reasonably due, and if any such excess has been paid, order the creditor to repay it.

The common law rule that usurious interest may be recovered

[1] *Accord:* Mobile, etc., R. Co. *v.* Steiner, 1878, 61 Ala. 559. And see Fairford Lumber Co. *v.* Tombigbee, etc., R. Co., 1910, 165 Ala. 275; 51 So. 770, 772.

[2] Tomkins *v.* Bernet, 1693, 1 Salk. 22.

[3] See Astley *v.* Reynolds, 1731, 2 Strange 915; Bosanquett *v.* Dashwood, 1734, Cas. t. Talb. 38, (in equity); Smith *v.* Bromley, 1760, 2 Doug. 696; Clarke *v.* Shee, 1774, 1 Cowp. 197.

[4] 17 & 18 Vict. c. 90. This repeal did not deprive the High Court of its equitable jurisdiction to give relief against unconscionable bargains between expectant heirs or needy persons and money lenders, where an unfair advantage had been taken. See James *v.* Kerr, 1888, 40 Ch. D. 449.

[5] 63 & 64 Vict. c. 51. See Samuel *v.* Newbold, [1906] A. C. 461.

has been adopted, either by statute or by judicial decision, in many of the United States.[1] Moreover, it has frequently been held that in the absence of an express abrogation of the common law remedy, the imposition of a statutory penalty for taking usurious interest — as double or treble the amount illegally received — does not deprive the debtor of his common law right to sue for the excess interest alone.[2] Said Chief Justice DIXON in a Wisconsin case:[3]

"If the borrower chooses, by not bringing his action within one year [the period fixed by the statute within which an action to enforce the penalty must be commenced], to waive his right to a treble recovery, he may do so and still retain the right to maintain an action for money had and received, to recover back the excess actually paid, at any time within the period prescribed by the statutes of limitations. For the remedy given by the statute is cumulative and not exclusive, as has frequently been decided in other States where similar statutory remedies have been given."

In a number of States, on the other hand, either because the statute expressly makes it lawful to pay and receive any rate

[1] Wood *v.* Cuthberson, 1884, 3 Dak. 328; 21 N. W. 3; State Bank *v.* Ensminger, 1884, 7 Blackf. (Ind.) 105; Baum *v.* Thoms, 1897, 150 Ind. 378; 50 N.E. 357; 65 Am. St. Rep. 368; Sherley *v.* Trabue, 1887, 85 Ky. 71; 2 S. W. 656; Furlong *v.* Pearce, 1864, 51 Me. 299; Scott *v.* Leary, 1871, 34 Md. 389; Commercial Bank *v.* Auze, 1897, 74 Miss. 609; 21 So. 754; Brown *v.* McIntosh, 1876, 39 N. J. L. 22; Hintze *v.* Taylor, 1894, 57 N. J. L. 239; 30 Atl. 551; Wheaton *v.* Hibbard, 1822, 20 Johns. (N. Y.) 290; 11 Am. Dec. 284; Cheek *v.* Iron Belt Bldg. Asso., 1900, 127 N. C. 121; 37 S. E. 150; Melton *v.* Snow, 1909, 24 Okla. 780; 104 Pac. 40; Philanthropic Building Asso. *v.* McKnight, 1860, 35 Pa. St. 470; Miners' Trust Co. Bank *v.* Roseberry, 1876, 81 Pa. St. 309; Bexar Building Asso. *v.* Robinson, 1890, 78 Tex. 163; 14 S. W. 227; 9 L. R. A. 292; 22 Am. St. Rep. 36; Nichols *v.* Bellows, 1849, 22 Vt. 581; 54 Am. Dec. 85; Harper *v.* Middle State Co., 1904, 55 W. Va. 149; 46 S. E. 817; Wood *v.* Lake, 1860, 13 Wis. 84.

[2] Baum *v.* Thoms, 1897, 150 Ind. 378; 50 N. E. 357; 65 Am. St. Rep. 368; Wheaton *v.* Hubbard, 1822, 20 Johns. (N. Y.) 290; 11 Am. Dec. 284; Porter *v.* Mount, 1863, 41 Barb. (N. Y.) 561; Wilson *v.* Selbie, 1895, 7 S. D. 494; 64 N. W. 537; Wood *v.* Lake, 1860, 13 Wis. 84; Schriber *v.* Le Clair, 1886, 66 Wis. 579, 29 N. W. 570, 889.

[3] Wood *v.* Lake, 1860, 13 Wis. 84, 97.

of interest,[1] or because a penalty imposed by statute is regarded as a substitute for the common law remedy,[2] or because the statute is construed to mean that contracts for usurious interest are merely unenforceable as to such interest and not illegal or void,[3] the right to restitution is denied.

§ 223. **Same: Right to recover usury: Upon principle.** — Two distinct doctrines of quasi contract may be summoned to the support of the rule that usurious interest is recoverable. One is that an unjust enrichment resulting from the performance of an illegal contract raises an obligation to make restitution

[1] Marvin *v.* Mandell, 1878, 125 Mass. 562; Brundage *v.* Burke, 1895, 11 Wash. 679; 40 Pac. 343. See Cal. Civil Code, § 1918.

[2] Carter *v.* Carusi, 1884, 112 U. S. 478; 5 S. Ct. 281, (Dist. of Col.); Matthews *v.* Paine, 1885, 47 Ark. 54; 14 S. W. 463; Nichols *v.* Skeel, 1861, 12 Ia. 300, (forfeiture goes to school fund); Crosby *v.* Bennett, 1843, 7 Metc. (Mass.) 17; Ransom *v.* Hayes, 1867, 39 Mo. 445, (forfeiture goes to school fund). In Nichols *v.* Skeel, *supra*, it was also declared that the parties were *in pari delicto*. Upon that point see the following section.

[3] Gross *v.* Coffey, 1896, 111 Ala. 468; 20 So. 428; Hadden *v.* Innes, 1860, 24 Ill. 382; Gist *v.* Smith, 1880, 78 Ky. 367; Woolfolk *v.* Bird, 1876, 22 Minn. 341; Blain *v.* Willson, 1891, 32 Neb. 302; 49 N. W. 224; Merchants Bank *v.* Lutterloh, 1879, 81 N. C. 142; Beach *v.* Guaranty Sav. Assn., 1904, 44 Or. 530; 76. Pac. 16. In Gross *v.* Coffey, *supra*, McCLELLAN, J. said (p. 475): "At common law such recovery was allowed, and in many of the states the action is sustained. The ruling, however, at common law and in those states, except when their statutes expressly or impliedly authorize this action, goes upon the theory that a contract to pay usury is illegal and void, and not voidable merely; and the main difference between the statutes in the states referred to and our own lies in the fact that they either in terms declare, or have been construed and held to declare, such contracts absolutely void, while the statutes of Alabama do not so declare, but only provide that a usurious contract cannot, when the objection is properly taken to it, *be enforced* in respect to the usury or interest, but may be as to the principal, and have uniformly been held to render such contracts to that extent voidable at the election of the payor, but not in and of themselves illegal and void. . . . So that, if the question were an open one in this court, we should not hesitate to declare that usury voluntarily paid, as it was in the case at bar, if paid at all, cannot be recovered back in an action of assumpsit. The promise to pay it is not illegal and void, but voidable only, at the election of the promisor. Not availing himself of the statutory defense, it cannot be said that his act in paying or the promisee's act in receiving usury is illegal."

which may be enforced if the plaintiff is not *in pari delicto;* the other, that a benefit conferred under compulsion must be restored. The former doctrine seems to fit the case perfectly. Since the charging of usurious interest is prohibited, a contract to pay and receive it is illegal, at least to the extent of the usury. And since the borrower is presumed to be at the mercy of the lender when the contract is entered into, he is not *in pari delicto* (*ante*, § 141). The latter doctrine — that a benefit conferred under compulsion must be restored — is not so clearly applicable. Admitting the presumption of duress at the inception of the contract, does it follow that duress continues throughout its performance? Conceivably it may, as where the borrower anticipates the necessity of borrowing again in the future. But under ordinary circumstances, as soon as the borrower receives the money his necessities are relieved and he is no longer at the mercy of the lender. If he nevertheless pays the excessive interest demanded of him, it would hardly seem that he does so under compulsion. As Professor Keener says,[1] "While one attempting to borrow money may, because of his necessities, be somewhat restrained in the exercise of his volition, it seems difficult to say that a payment made by one who has the right to refuse to pay, is a payment made under compulsion."

An examination of the cases will show that the courts have frequently linked the two doctrines together in support of the right to recover. A typical judicial statement is that of the Supreme Court of New Jersey, in *Brown* v. *McIntosh:*[2]

"No payment obtained through oppression or undue advantage is voluntary, and the law presumes every payment made to a person who is by statute forbidden to receive it, where the statute is for the protection of the payer, as made through oppression and undue advantage."

But the right has usually been regarded as resting chiefly upon the doctrine of benefits conferred under compulsion, and the cases may conveniently be treated under that head.

[1] "Quasi-Contracts," p. 436.

[2] 1876, 39 N. J. L. 22, 26.

§ 224. **Same: Right to recover from assignee of usurer.** — The assignee of a loan who collects from the borrower usurious interest on the principal is obviously in no better position than the original lender, and must make restitution. The same is true of the assignee of a note given for usurious interest who receives payment thereof,[1] unless he is an innocent purchaser for value. An innocent purchaser for value of negotiable paper, before maturity, takes it freed from the defense of usury,[2] except where the note is by statute void for usury,[3] and therefore cannot be compelled to make restitution. And while an innocent purchaser for value of non-negotiable paper takes it subject to such defense,[4] there is no injustice in his retention of money received in payment thereof, and consequently he is likewise under no quasi contractual obligation. However, the maker who pays to an innocent purchaser for value is not without remedy, for he may recover from the payee [5] — at least to the extent of the amount realized by the payee from the sale of the note over and above the amount which he might legally have

[1] See Eggen *v.* Huston, 1890, 12 Ky. Law Rep. 158; 13 S.W. 919; Williams *v.* Wilder, 1865, 37 Vt. 613.

[2] Tilden *v.* Blair, 1874, 21 Wall. (U. S.) 241; Conkling *v.* Underhill, 1842, 3 Scram. (4 Ill.) 388; Wortendyke *v.* Meehan, 1879, 9 Neb. 221; 2 N. W. 339; Bradshaw *v.* Vanvalkenburg, 1896, 97 Tenn. 316; 37 S. W. 88; Lynchburg Nat. Bank *v.* Scott, 1895, 91 Va. 652; 22 S. E. 487; 29 L. R. A. 827; 50 Am. St. Rep. 860.

[3] Lowe *v.* Waller, 1781, 2 Doug. 736; Bridge *v.* Hubbard, 1818, 15 Mass. 96; 8 Am. Dec. 86; Union Nat. Bank *v.* Fraser, 1885, 63 Miss. 231; Wilkie *v.* Roosevelt, 1802, 3 Johns. Cas. (N. Y.) 206; 2 Am. Dec. 149; Ward *v.* Sugg, 1893, 113 N. C. 489; 18 S. E. 717; 24 L. R. A. 280; Galliard *v.* Le Seigneur, 1841, 1 McMull. L. (S. C.) 225; Gilder *v.* Hearne, 1890, 79 Tex. 120; 14 S. W. 1031.

[4] Allison *v.* Barrett, 1864, 16 Ia. 278; Wing *v.* Dunn, 1844, 24 Me. 128, (after maturity); Doll *v.* Hollenbeck, 1886, 19 Neb. 639; 28 N. W. 286; Chapin *v.* Thompson, 1880, 23 Hun (N. Y. Sup. Ct.) 12, 16; Zeigler *v.* Maner, 1898, 53 S. C. 115; 30 S. E. 829; 69 Am. St. Rep. 842; Aldrich *v.* Wood, 1870, 26 Wis. 168, (after maturity).

[5] Woodworth *v.* Huntoon, 1865, 40 Ill. 131; 89 Am. Dec. 340; Culver *v.* Osborne, 1907, 231 Ill. 104; 83 N. E. 110; 121 Am. St. Rep. 302; Lacy *v.* Brown, 1879, 67 Ind. 478; Harbaugh *v.* Tanner, 1904, 163 Ind. 574; 71 N. E. 145; Webb *v.* Wilshire, 1841, 19 Me. 406; Dunn *v.* Moore, 1875, 26 Oh. St. 641.

collected from the maker.[1] To that extent the payee has received a benefit the retention of which is unjust.

§ 225. **Same: Right to recover before principal and legal interest are paid.** — It is a general rule, sometimes stated without qualification, that there is no right to recover usurious interest until the principal and legal interest are fully paid.[2] In other words, the creditor may insist that usurious interest received by him be applied in diminution of the lawful debt. If, however, usurious interest is paid *eo nomine* and in satisfaction of an undertaking separate and distinct from the undertaking to pay principal and legal interest, it would seem that an obligation to make restitution arises immediately, although the lawful debt is still unpaid.[3]

§ 226. **Same: Right of debtor to have usurious interest applied in diminution of principal.** — In jurisdictions in which usurious interest paid by the debtor is recoverable, the debtor

[1] Webb *v.* Wilshire, 1841, 19 Me. 406. In Atwell *v.* Gowell, 1867, 54 Me. 358, 360, the court said: "When, as in Webb *v.* Wilshire, 19 Me. 406, the payee of a note, tainted with usury, sells it for the full amount due on it, and the maker afterwards pays that amount to the holder, an action against the payee can be maintained, because in such a case he has indirectly received the usurious interest. But when, as in this case, the payee sells the note for less than the amount due upon it, exclusive of usurious interest, the proposition that he is the recipient of illegal interest cannot be maintained, and an action will not lie against him."

[2] McBroom *v.* Scottish Investment Co., 1894, 153 U. S. 318; 14 S. Ct. 852; Kendall *v.* Davis, 1892, 55 Ark. 318; 18 S. W. 185; Hawkins *v.* Welch, 1844, 8 Mo. 490.

[3] Grow *v.* Albee, 1847, 19 Vt. 540; Nichols *v.* Bellows, 1849, 22 Vt. 581; 54 Am. Dec. 85. In Davis *v.* Converse, 1863, 35 Vt. 503, 507, the court said: "It seems now to be settled by repeated decisions, that where usury is included in a note or other security, and when paid is indorsed upon the note, it is to be considered as a payment upon the note itself, and no action can be maintained to recover back the usury paid, so long as there remains due any part of the principal, and lawful interest, but that where the security is only for the principal and legal interest, and the unlawful interest is either put into a separate obligation, or rests in a verbal agreement, so that when paid it is not indorsed upon the note, but is paid as usury *eo nomine*, it is otherwise, and a right of action accrues immediately to sue and recover it back, though the lawful debt is still unpaid."

undoubtedly has the right to have such interest applied in diminution of the principal.[1] Under statutes imposing as a penalty for taking usury, the forfeiture of *all* interest, it has in some cases been held that the debtor is entitled to have the entire interest paid applied upon principal;[2] but in other cases the right of application under such statutes has been limited to the amount paid in excess of the legal rate.[3] Where the recovery

[1] McGee *v.* Long, 1889, 83 Ga. 156; 9 S. E. 1107; Thompson *v.* Baird, 1895, 17 Ky. Law Rep. 403; 31 S. W. 280; New York Security Co. *v.* Davis, 1902, 96 Md. 81; 53 Atl. 669; Adams *v.* Mahnken, 1886, 41 N. J. Eq. 332; 7 Atl. 435; Nunn *v.* Bird, 1900, 36 Or. 515; 59 Pac. 808; Nye *v.* Malo, 1857, L. C. R. (Queb.) 405; First Nat. Bank *v.* Wood, 1881, 53 Vt. 491; Meem *v.* Dulaney, 1890, 88 Va. 674; 14 S. E. 363; Norvell *v.* Hedrick, 1883, 21 W. Va. 523. But see, *contra*, Walsh *v.* Mayer, 1884, 111 U. S. 31; 4 S. Ct. 260.

In the following cases the statute expressly provided for application: Atlanta Sav. Bank *v.* Spencer, 1899, 107 Ga. 629; 33 S. E. 878; Bowen *v.* Phillips, 1876, 55 Ind. 226; Vandergrif *v.* Swinney, 1900, 158 Mo. 527; 59 S. W. 71; 81 Am. St. Rep. 325; Land Mortgage, etc., Co. *v.* Gillam, 1896, 49 S. C. 345; 26 S. E. 990; 29 S. E. 203; Libert *v.* Unfried, 1907, 47 Wash. 186; 91 Pac. 776.

[2] Fowler *v.* Equitable Trust Co., 1891, 141 U. S. 384; 12 S. Ct. 1, (Illinois law); Crane *v.* Goodwin, 1886, 77 Ga. 362; Madsen *v.* Whitman, 1902, 8 Idaho 762; 71 Pac. 152; Fretz *v.* Murray, 1898, 118 Mich. 302; 76 N. W. 495; Male *v.* Wink, 1901, 61 Neb. 748; 86 N. W. 472; Wilson *v.* Selbie, 1895, 7 S. D. 494; 64 N. W. 537.

[3] Wood *v.* Cuthberson, 1884, 3 Dak. 328; 21 N. W. 3. Fay *v.* Lovejoy, 1866, 20 Wis. 403, 405. ("The reason is," said the court, "that equity never favors a forfeiture, and will not, unless bound down by statute, lend its aid to enforce one, but will, as a condition of relief, hold the party to the performance of that which is just and equitable. The payment of the principal sum loaned and the lawful interest is always regarded as just and equitable. It is no more than the borrower ought in conscience to pay, nor than, in the absence of the prohibition of the statute, he would be required to pay. If therefore he has paid the interest, a court of equity will not aid him to get it back within the lawful rate, though the lender had no action to compel its payment. And the rule is the same in an action at law for money had and received, to recover it back; or if the borrower set off the interest money paid against the principal sum in a legal action of the lender to recover that. Money had and received, though legal in form, is in its nature an equitable remedy, and lies only where the defendant has received money which, *ex æquo et bono*, he ought to refund.")

In some jurisdictions where the borrower is permitted to set off all interest paid in an action by the lender to recover the principal, he will not be afforded affirmative relief in equity unless he first pays

of excessive interest by the debtor is denied, it would seem that there should be no right of application in diminution of principal. Such is the rule in some jurisdictions;[1] but in others the right of application is recognized.[2] There is also a difference of opinion as to the right to have usurious interest applied on principal after the right to recover such interest has been barred by the statute of limitations. A proper regard for the spirit and purpose of the statute points to the conclusion that the right of application is barred with the right of recovery.[3] In some cases, however, it has been held otherwise.[4]

§ 227. **Same: Recovery of usurious interest under National Bank Act.** — The Act of 1864,[5] commonly called the National Bank Act, imposes as a penalty for the taking of usurious interest by national banks the forfeiture of *all* interest, and in

or tenders the principal and legal interest. See Sanner *v.* Smith, 1878, 89 Ill. 123; 31 Am. Rep. 70; Eiseman *v.* Gallagher, 1888, 24 Neb. 79; 37 N. W. 941.

[1] Woolfolk *v.* Bird, 1876, 22 Minn. 341; Livingston *v.* Burton, 1891, 43 Mo. App. 272, (since changed by statute: see following note); Bank. *v.* Lutterloh, 1879, 81 N. C. 142; Quinlan *v.* Gordon, 1861, 20 Grant's Ch. (U. C. Ont.), Appendix i; Brundage *v.* Burke, 1895, 11 Wash. 679; 40 Pac. 343.

[2] Nicrosi *v.* Walker, 1903, 139 Ala. 369; 37 So. 97; Harris *v.* Bressler, 1887, 119 Ill. 467; 10 N. E. 188; Smith *v.* Cooper, 1859, 9 Ia. 376; Flinn *v.* Mechanics Bldg. Assn., 1902, 93 Mo. App. 444; 67 S. W. 729, (by statute). In Smith *v.* Cooper, *supra*, the court said (p. 385): "But the language of the statute is, that no person shall directly or indirectly *receive*, in any manner, more interest than is therein prescribed. Now, if the plaintiffs recover (with the amount paid them on the same) the principal sum included in the note, will they not, by the action and judgment of the court, *receive*, not indirectly, but directly, usurious interest upon their contract — the very contract on which they rely for judgment?"

[3] Carter *v.* Carusi, 1884, 112 U. S. 478; 5 S. Ct. 281, (Dist. of Col.); Carter *v.* Farthling, 1903, 115 Ky. 123; 72 S. W. 745; Cummings *v.* Knight, 1889, 65 N. H. 202; 23 Atl. 148; Wilson *v.* Selbie, 1895, 7 S. D. 494; 64 N. W. 537; Davis *v.* Converse, 1863, 35 Vt. 503; Crabtree *v.* Old Dominion, etc., Assn., 1898, 95 Va. 670; 29 S. E. 741; 64 Am. St. Rep. 818.

[4] Neale *v.* Rouse, 1892, 93 Ky. 151; 19 S. W. 171, (but see Carter *v.* Farthling, in preceding note); Smith *v.* Mason, 1897, (Tex. Civ. App.) 39 S. W. 188.

[5] R. S. § 5198.

case usurious interest has actually been paid, gives to the borrower the right to recover back twice the amount of interest thus paid from the association taking or receiving the same; *provided*, that such action is commenced within two years from the time the usurious transaction occurred.

The Supreme Court of the United States has held not only that the remedy provided the borrower by the statute is exclusive, but that in an action by a bank to collect the principal debt the borrower cannot set up by way of counterclaim or set-off that the bank has received usurious interest.[1]

[1] Barnet *v.* Muncie Nat. Bank, 1878, 98 U. S. 555. The rule established by the Supreme Court has been enforced, in actions by national banks, by the State courts. See Peterborough Nat. Bank *v.* Childs, 1882, 133 Mass. 248; 43 Am. Rep. 509; Central Nat. Bank *v.* Haseltine, 1900, 155 Mo. 58; 55 S. W. 1015; 85 Am. St. Rep. 531, (*aff.* 183 U. S. 132; 22 S. Ct. 50); Nat. Bank *v.* Lewis, 1880, 81 N. Y. 15; Nat. Bank *v.* Dushane, 1880, 96 Pa. St. 340. But see Wachovia Nat. Bank *v.* Ireland, 1898, 122 N. C. 571; 29 S. E. 835. See 5 Fed. Stat. Anno. 133, for extensive collection of authorities.

The same rule was applied, in Caponigri *v.* Altieri, 1901, 165 N. Y. 255; 59 N. E. 87, to a case arising under a New York statute similar to the National Bank Act.

CHAPTER XVI

CONSTRAINT OF LEGAL PROCEEDINGS

§ 228. (I) Constraint of commencement of action.
§ 229. (II) Constraint of judgment:
(1) In general: *Res judicata.*
§ 230. (2) Void judgment.
§ 231. (3) Judgment satisfied but not discharged.
§ 232. (4) Judgment subsequently reversed.
§ 233. Same: Recovery by person other than judgment defendant.
§ 234. Same: Recovery from whom.
§ 235. Same: Measure of recovery.
§ 236. Same: Reversal on technical grounds.

§ 228. (I) **Constraint of commencement of action.** — It is well settled that money paid with full knowledge of the facts in satisfaction of a claim on which action has been commenced, but no judgment obtained, is not recoverable.[1] Various reasons have been given for this rule. It has been pointed out that payment of a claim under such circumstances would be an idle ceremony if the only effect were to reverse the position of the parties as plaintiff and defendant; that to allow recovery would be unjust to the payee since it would subject him to suit at such time and place as might be chosen by the payor; that if the defendant paying in the first action could make that payment the basis of a second action, the defendant in the second

[1] Hamlet *v.* Richardson, 1833, 9 Bing. 644; Moore *v.* Vestry of Fulham, [1895] 1 Q. B. 399; Watson *v.* Cunningham, 1824, 1 Blackf. (Ind.) 321; Benson *v.* Monroe, 1851, 7 Cush. (Mass.) 125; 54 Am. Dec. 716; Vereycken *v.* Vandenbrooks, 1894, 102 Mich. 119; 60 N. W. 687; Turner *v.* Barber, 1901, 66 N. J. L. 496; 49 Atl. 676; Wheatley *v.* Waldo, 1863, 36 Vt. 237; Beard *v.* Beard, 1885, 25 W. Va. 486; 52 Am. Rep. 219. In Moore *v.* Vestry of Fulham, *supra*, relief was denied though it appeared that the plaintiff made the payment under a mistake of fact which led him to believe that the demand sued upon was just. The reasons for the denial of relief do not apply to such a case, and the decision seems unsound.

action would have the same privilege and the litigation could be made interminable.[1] A more fundamental reason would seem to be that, since a mere resort to legal process will not, under ordinary circumstances, influence the conduct of a man of average intelligence and will, the payment is not regarded as made under compulsion.[2]

The right to recover money extorted by duress of person or of goods, whether under color of legal process or otherwise, is elsewhere considered (*ante*, §§ 214–216).

§ 229. (II) **Constraint of judgment**: (1) **In general**: **Res judicata.** — A payment made after the entry of adverse judgment may be claimed, with better reason, to be made under compulsion. But so long as the judgment remains, another obstacle to the recovery of money collected thereunder is encountered in the doctrine of *res judicata:*

Marriot v. *Hampton*, 1797, 7 Term R. 269: The defendant formerly brought an action against the present plaintiff for goods sold, for which the plaintiff had before paid and obtained the defendant's receipt; but not being able to find the receipt at that time, and having no other proof of payment, he could not defend the action but was obliged to submit and pay the money again, and he gave a *cognovit* for the costs. The plaintiff afterwards found the receipt, and brought this action for money had and received in order to recover back the amount of the sum so wrongfully enforced in payment. Lord KENYON, C.J. (p. 269): "I am afraid of such a precedent. If this action could be maintained I know not what cause of action could ever be at rest. After a recovery by process of law there must be an end of litigation, otherwise there would be no security for any person."

Walker v. *Ames*, 1823, 2 Cow. (N. Y.) 428: On *certiorari* to a Justice's court. The action was case in the court below, by Ames against Walker; "For that the defendant did fraudulently obtain a judgment, or a certain part thereof, against the present plaintiff, to his damage $25." The defendant

[1] See Keener, "Quasi-Contracts," p. 411.

[2] Turner *v.* Barber, 1901, 66 N. J. L. 496; 49 Atl. 676; Wheatley *v.* Waldo, 1863, 36 Vt. 237.

pleaded the former suit in bar, which was overruled by the Justice. The fraud complained of was that Walker, in the suit against Ames, recovered on a book account, and also on a note given by Ames to Walker, on a settlement of the same account, for the balance thereof. Verdict and judgment for the plaintiff. *Curia* (p. 429): "The judgment must be reversed. This was overhauling the first judgment, and attempting to recover back a portion of it, on the ground that it was not due, and had been unconscientiously recovered. . . . There would, indeed, *be no end to litigation, nor any security to any person,* if actions like this could be sustained." [1]

It has commonly been thought that Lord MANSFIELD, in the much discussed case of *Moses* v. *Macferlan*,[2] reached a contrary conclusion. It there appeared that the plaintiff Moses had indorsed to the defendant Macferlan four several promissory notes of which the plaintiff was payee, for the purpose of enabling the defendant to recover from the maker, the defendant

[1] *Accord:* De Medina *v.* Grove, 1846, 10 Q. B. 152, *aff.* 172; Trustees of the University *v.* Keller, 1840, 1 Ala. 406, (and see Turlington *v.* Slaughter, 1875, 54 Ala. 195); Carter *v.* First Ecclesiastical Society, 1820, 3 Conn. 455; Hagar *v.* Springer, 1872, 60 Me. 436; Gordon's Extr. *v.* Mayor of Baltimore, 1847, 5 Gill (Md.) 231; Homer *v.* Fish, 1823, 1 Pick. (Mass.) 435; 11 Am. Dec. 218; Fuller *v.* Shattuck, 1859, 13 Gray (Mass.) 70, (but see Lazell *v.* Miller, 1818, 15 Mass. 207); People's Savings Bank *v.* Heath, 1900, 175 Mass. 131; 55 N. E. 807; 78 Am. St. Rep. 481; Greenabaum *v.* Elliott, 1875, 60 Mo. 25; Desert National Bank *v.* Nuckolls, 1890, 30 Neb. 754; 47 N. W. 202; Wilson *v.* Cameron, 1842, 3 N. Bruns. 542; Tilton *v.* Gordon, 1817, 1 N. H. 33; Bink *v.* Wood, 1864, 43 Barb. (N. Y. Sup. Ct.) 315; Converse *v.* Sickles, 1893, 74 Hun 429; 26 N. Y. Supp. 590, (case reversed on other grounds: 1895, 146 N. Y. 200, 205; 40 N. E. 777); Finklestone *v.* Lanzke, 1909, 63 Misc. Rep. 330; 117 N. Y. Supp. 183; Federal Ins. Co. *v.* Robinson, 1876, 82 Pa. St. 357; Ogle *v.* Baker, 1890, 137 Pa. St. 378; 20 Atl. 998; 21 Am. St. Rep. 886; James *v.* Cavit, 1807, 2 Brev. (S. C.) 174; Kirklan *v.* Brown's Admrs., 1843, 4 Humph. (23 Tenn.) 174; 40 Am. Dec. 635; Corey *v.* Gale, 1841, 13 Vt. 639. But see, *contra*, Clay *v.* Clay, 1854, 13 Tex. 195. In Ward & Co. *v.* Wallis, [1900] 1 Q. B. 675, 678, it is said that the rule does not apply where the person securing the judgment is guilty of bad faith. But see, *contra*, Walker *v.* Ames, quoted in the text.

[2] 1760, 2 Burr. 1005, 1008–9.

agreeing to indemnify the plaintiff against liability because of such indorsement. Notwithstanding the agreement of indemnity, the defendant Macferlan sued the plaintiff Moses in the Court of Conscience, as indorser of the notes. The plaintiff set up the agreement of indemnity as a defense, but the court, "thinking they had no power to judge of it," gave judgment for the present defendant. The plaintiff thereupon paid the judgment, and brought this action in the King's Bench to recover the money so paid. The court held that he might recover.

Lord MANSFIELD: "Many other objections, besides that which arose at the trial, have since been made as to the propriety of this action in the present case. . . . 3d. Objection. Where money has been recovered by the judgment of a court having competent jurisdiction, the matter can never be brought over again by a new action. Answer. It is most clear 'that the merits of a judgment can never be over-haled by an original suit, either at law or in equity.' Till the judgment is set aside or reversed, it is conclusive, as to the subject matter of it, to all intents and purposes. But the ground of this action is consistent with the judgment of the Court of Conscience; it admits the commissioners did right. They decreed upon the indorsement of the notes by the plaintiff: which indorsement is not now disputed. The ground upon which this action proceeds, was no defence against that sentence. It is enough for us, that the commissioners adjudged 'they had no cognizance of such collateral matter.' We cannot correct an error in their proceedings; and ought to suppose what is done by a final jurisdiction, to be right. But we think 'the commissioners did right, in refusing to go into such collateral matter.' . . . The ground of this action is not, 'that the judgment was wrong,' but, 'that, (for a reason which the now plaintiff could not avail himself of against that judgment), the defendant ought not in justice to keep the money.' And at Guildhall, I declared very particularly, 'that the merits of a question determined by the commissioners, where they had jurisdiction, never could be brought over again in any shape whatever.'"

This decision has been severely criticized and is often declared to have been overruled, in effect, by *Marriot* v. *Hampton, supra,* and subsequent cases:

Carter v. *First Ecclesiastical Society,* 1820, 3 Conn. 455: PETERS, J. (p. 461): "To entitle the plaintiff to a verdict, the case of *Moses* v. *Macferlan,* 2 Burr. 1005, must be revived. But the authority of that case has been too often shaken, to have any weight at the present day. Though the principles, relating to *indebitatus assumpsit,* so luminously illustrated in *Moses* v. *Macferlan,* have been universally recognized, their application to that case has been generally reprobated, by the Bench as well as the Bar. In that case, money obtained from the plaintiff, pursuant to a judgment of a court, then in force, was recovered back, on proof of facts *dehors* the record, whereby it appeared, that the defendant, *ex æquo et bono* ought not to retain it. This has been considered as an over-haling or impeaching of a judgment, indirectly. But Lord *Mansfield* himself, in that very case, informs us, 'that the merits of a judgment cannot be over-haled, by an original suit, either at law, or in equity. Till the judgment is set aside, or reversed, it is conclusive, as to the subject matter of it, to all intents and purposes,' p. 1009. How, then, could it be against conscience for *Macferlan* to retain this money, thus awarded him, by a court of justice, merely because he had violated his agreement, for which he was liable in damages, but not to refund the money he had recovered. Well might he have said, '*Non in hæc fœdera veni.*'"

Kirklan & Hickson v. *Brown's Admrs.,* 1853, 4 Humph. (23 Tenn.) 174; 40 Am. Dec. 635: REESE, J. (p. 175): "In the great case of Moses v. Macferlan, 2 Burr. 1005, the *ex æquo et bono* principle of the action of assumpsit, announced by Lord Mansfield, as well as the facts and circumstances of the case, might seem to give some ground for the maintainance of a suit like this. But of that case, as well as of some others determined by Lord Mansfield, it may be said, *materiam superavit opus.* The great principles marked out and developed by his original and powerful intellect remain to guide us; but their framework, the facts and circumstances to which they were appended, not always appropriate, have in some instances given way and ceased to sustain them."

It has been contended, however, that the case is distinguishable from those with which it is supposed to be in conflict, in that the subject matter of the action, although offered as a defense in the suit against the plaintiff in the Court of Conscience, was not passed upon by that court because of want of jurisdiction.[1] Certainly, Lord MANSFIELD himself did not regard his decision as an overhauling of the judgment of the Court of Conscience. He expressly declares that " the merits of a judgment can never be over-haled by an original suit, either at law or in equity." But since the theory of the action in the King's Bench was the recovery of the money paid under the judgment of the Court of Conscience upon the ground that the payment of such judgment unjustly enriched the defendant, a decision allowing such recovery would seem to have the *effect*, at least, of overhauling the former judgment. It is true that Lord MANSFIELD did not hold the former judgment " wrong," *i.e.* based upon an erroneous conclusion from the facts which the Court of Conscience was able to consider, but if that be a valid distinction, might not Lord KENYON have held in *Marriott* v. *Hampton*, that while the court which entered the former judgment undoubtedly reached a sound conclusion from the facts then in its possession, the subsequent discovery of the receipt by the plaintiff convinced him that the payment of the former judgment had unjustly enriched the defendant and that a recovery in quasi contract should therefore be allowed?

In regard to *Moses* v. *Macferlan* it may be added that Macferlan obviously committed a breach of contract in suing Moses on his indorsement, and that Moses might have maintained special assumpsit for the damages resulting from such breach. If the theory of Moses' action had been the recovery of such damages rather than the recovery of money paid under con-

[1] "In *Moses* v. *Macferlan*, it was decided that a defendant who is unable to avail himself of certain matter because the court in which the action is brought cannot entertain the defense for want of jurisdiction, is not precluded by the payment of a judgment therein from making such matter the basis of an action for recovery of the money so paid." — Keener, "Quasi-Contracts," p. 413.

straint of a judgment, there would appear to have been no valid objection to a decision in his favor.[1]

§ 230. (2) **Void judgment.** — If a judgment is not merely erroneous but void — as for want of jurisdiction — it is of course totally without legal effect. And since nothing is determined by it, the doctrine of *res judicata* is no obstacle to the recovery of money collected thereunder.[2] Payment must have been made under compulsion, however, and it has been held that money paid in satisfaction of a void judgment upon which execution had not been issued may not be recovered.[3]

§ 231. (3) **Judgment satisfied but not discharged.** — Money collected by means of an execution issued upon a judgment which has been paid but not discharged of record may be recovered, since the overhauling of the judgment is not involved.[4] So also where money is paid but not credited on a judgment and the whole amount of the judgment is subsequently collected by levy and sale, the excess must be repaid to the judgment debtor.[5]

§ 232. (4) **Judgment subsequently reversed.** — An action to recover money paid upon a judgment subsequently reversed is not open to the objection that it is an attempt to overhaul a prior judgment. The sole question is: was the payment made under compulsion? If execution had issued before payment was made, the answer, it is agreed, must be in the affirma-

[1] See Keener, "Quasi-Contracts," p. 415.

[2] Newdigate *v.* Davy, 1692–93, 1 Ld. Raym. 742; Farrow *v.* Mayes, 1852, 18 Q. B. 516; Hollingsworth *v.* Stone, 1883, 90 Ind. 244; Murray *v.* Moorer, 1840, Cheves (S. C.) 111. *Contra:* Bailey *v.* Buell, 1872, 50 N. Y. 662, (but see Trimmer *v.* City of Rochester, 1892, 130 N. Y. 401, 405; 29 N. E. 746).

[3] Elston *v.* City of Chicago, 1866, 40 Ill. 514; 89 Am. Dec. 361.

[4] Logan *v.* Sumter, 1859, 28 Ga. 242; 73 Am. Dec. 755; Field *v.* Yeaman, 1907, 31 Ky. Law Rep. 12; 101 S. W. 368; Davis *v.* Gott, 1908, 130 Ky. 486; 113 S. W. 826; Pope *v.* Benster, 1894, 42 Neb. 304; 60 N. W. 561; 47 Am. St. Rep. 703; Wisner *v.* Buckley, 1836, 15 Wend. (N. Y.) 321. And see Ewing *v.* Peck, 1855, 26 Ala. 413.

[5] Catterlin *v.* Somerville, 1864, 22 Ind. 482; Hale *v.* Passmore, 1836, 4 Dana (34 Ky.) 70; Cocke *v.* Porter's Extrs., 1840, 2 Humph. (21 Tenn.) 15.

tive.[1] And while there are a few cases to the contrary,[2] the weight of authority supports the view that a valid judgment (though it subsequently proves erroneous), without the issue of execution and without actual threats to seize or sell the judgment debtor's property, is sufficiently coercive to raise an obligation, when the judgment is reversed, to make restitution.[3]

It was usual, at the common law, to incorporate in the judgment of reversal a direction that the appellant "be restored to all things which he has lost on occasion of the judgment aforesaid." Pursuant to such direction a writ of restitution issued, or in case the amount paid by the appellant did not appear of record, process in the nature of an order to show cause, known as a *scire facias quare restitutionem habere non debit.* In some States a similar remedy has been provided by

[1] Dupuy *v.* Roebuck, 1845, 7 Ala. 484; Ewing *v.* Peck, 1855, 26 Ala. 413; Raum *v.* Reynolds, 1861, 18 Cal. 275; Hosmer *v.* Barret, 1794, 2 Root (Conn.) 156; Martin *v.* Woodruff, 1850, 2 Ind. 237; Keehn *v.* McGillicuddy, 1898, 19 Ind. App. 427; 49 N. E. 609; Chicago, etc., R. Co. *v.* Adams, 1901, 26 Ind. App. 443; 59 N. E. 1087; Stevens *v.* Fitch, 1846, 11 Metc. (Mass.) 248; Clark *v.* Pinney, 1826, 6 Cow. (N. Y.) 298; Sturges *v.* Allis, 1833, 10 Wend. (N. Y.) 354, (In this case a new trial had been ordered and the original suit was still pending: but see People *v.* Cornell, 1909, 65 Misc. Rep. 452; 121 N. Y. Supp. 972, where the restitution of a fine was refused after reversal of conviction and order of new trial, appeal having been taken to the Court of Appeals on the judgment reversing conviction.); Haebler *v.* Myers, 1892, 132 N. Y. 363; 30 N. E. 963; 15 L. R. A. 588; 28 Am. St. Rep. 589; Metschan *v.* Grant County, 1899, 36 Or. 117; 58 Pac. 80; Travellers' Ins. Co. *v.* Heath, 1880, 95 Pa. St. 333. See United States Bank *v.* Bank of Washington, 1832, 6 Pet. (U. S.) 8; Duncan *v.* Kirkpatrick, 1825, 13 Serg. & R. (Pa.) 292; Beard *v.* Beard, 1885, 25 W. Va. 486; 52 Am. Rep. 219. But see, *contra*, Gould *v.* McFall, 1888, 118 Pa. St. 455; 12 Atl. 336; 4 Am. St. Rep. 606.

[2] Winston *v.* Nunez, 1873, 25 La. Ann. 476; Ritchie *v.* Carter, 1901, 89 Mo. App. 290, (but see Campbell *v.* Kauffman Milling Co., 1907, 127 Mo. App. 287; 105 S. W. 286).

[3] Glover *v.* Foote, 1844, 7 Blackf. (Ind.) 293; Campbell *v.* Kauffman Milling Co., 1907, 127 Mo. App. 287; 105 S. W. 286; Lott *v.* Swezey, 1859, 29 Barb. (N.Y.) 87; Scholey *v.* Halsey, 1878, 72 N. Y. 578, (but see Third Ave. R. Co. *v.* Klinker, 1899, 29 Civ. Proc. Rep. 51; 58 N. Y. Supp. 136); Chapman *v.* Sutton, 1887, 68 Wis. 657; 32 N. W. 683. See Hipp. *v* Crenshaw, 1884, 64 Ia. 404; 20 N. W. 492.

statute.[1] Neither the "antiquated remedy by *scire facias*," however, nor a statutory substitute therefor, is exclusive of the appellant's right to enforce restitution in a separate action,[2] although it has been held that where an order of restitution is incorporated in the judgment, assumpsit will not lie "because the plaintiff would otherwise be permitted to turn his judgment into a simple-contract debt."[3]

§ 233. **Same: Recovery by person other than the judgment defendant.** — One who, as the real party in interest, pays a judgment which is subsequently reversed, may recover the amount paid though not a defendant of record in the first action.[4] In like manner, it seems, a surety who pays a judgment against his principal may upon reversal enforce restitution;[5] although there are cases holding, on the contrary, that the surety must look to his principal.[6] Since payment by a garnishee discharges his obligation to the defendant in the principal action, the subsequent reversal of the judgment entitles such defendant, and not the garnishee, to enforce restitution.[7]

§ 234. **Same: Recovery from whom.** — Money paid in satisfaction of a judgment subsequently reversed may be recovered from the judgment creditor, or, in case he was but a nominal plaintiff, from the person in whose interest the action was

[1] See Haebler *v.* Myers, 1892, 132 N. Y. 363, 367; 30 N. E. 963; 15 L. R. A. 588; 28 Am. St. Rep. 589.

[2] Clark *v.* Pinney, 1826, 6 Cow. (N. Y.) 298; Haebler *v.* Myers, 1892, 132 N. Y. 363; 30 N. E. 963; 15 L. R. A. 588; 28 Am. St. Rep. 589.

[3] Duncan *v.* Kirkpatrick, 1825, 13 Serg. & R. (Pa.) 292.

[4] Stevens *v.* Fitch, 1846, 11 Metc. (Mass.) 248; Mann *v.* Ætna Ins. Co., 1875, 38 Wis. 114.

[5] Williams *v.* Simmons, 1853, 22 Ala. 425; Kalmbach *v.* Foote, 1890, 79 Mich. 236; 44 N. W. 603.

[6] Ritchie *v.* Carter, 1901, 89 Mo. App. 290; Garr *v.* Martin, 1859, 20 N. Y. 306.

[7] Lewis *v.* Chicago, etc., R. Co., 1897, 97 Wis. 368; 72 N. W. 976. And see Duncan *v.* Ware's Extrs., 1833, 5 Stew. & P. (Ala.) 119; 24 Am. Dec. 772; McElwee *v.* Wilce, 1898, 80 Ill. App. 338. But see First Nat. Bank *v.* Millon, 1881, 45 Mich. 413; 8 N. W. 80.

brought;[1] but persons to whom the judgment creditor has paid over the money in discharge of his debts are not liable.[2] It has been said that an action will lie against the attorney for the judgment creditor in case he receives and retains the money on behalf of his client,[3] but this is doubtful.[4] Certainly, if the attorney or other agent to whom the money is paid retains it, with the consent of his principal, in satisfaction of a debt owing from such principal, or otherwise applies it in accordance with the principal's directions, he cannot be held.[5]

Whoever is sued, it must appear that the money was actually received by him or by his agent.[6] Proof that the money sought to be recovered was paid to the sheriff is not enough.

§ 235. **Same: Measure of recovery.** — Since a judgment, though erroneous, is valid and binding until it is reversed, the judgment creditor commits no wrong in proceeding to enforce it. In case of a subsequent reversal, therefore, he should not be held liable for damages resulting from its enforcement.[7] The extent of his obligation is to restore that which he realized from its enforcement. Where the judgment is satisfied by

[1] Maghee *v.* Kellogg, 1840, 24 Wend. (N. Y.) 32; Langley *v.* Warner, 1850, 3 N. Y. 327; Catlin *v.* Allen, 1845, 17 Vt. 158. But see Little *v.* Bunce, 1835, 7 N. H. 485; 28 Am. Dec. 363.

[2] Florida, etc., R. Co. *v.* Bisbee, 1881, 18 Fla. 60; Fidelity Trust, etc., Co. *v.* Louisville Banking Co., 1900, 119 Ky. 675; 58 S. W. 712; Dennett *v.* Nevers, 1831, 7 Me. 399.

[3] Catlin *v.* Allen, 1845, 17 Vt. 158. And see *Ex parte* Morris & Johnson, 1869, 9 Wall. (U. S.) 605.

[4] Wright *v.* Aldrich, 1880, 60 N. H. 161; Green *v.* Brengle, 1888, 84 Va. 913; 6 S. E. 603.

[5] Bank of the United States *v.* Bank of Washington, 1832, 6 Pet. (U. S.) 8; McDonald *v.* Napier, 1853, 14 Ga. 89; Wright *v.* Aldrich, 1880, 60 N. H. 161; Langley *v.* Warner, 1850, 3 N. Y. 327; Butcher *v.* Henning, 1895, 90 Hun (N. Y. Sup. Ct.) 565; 35 N. Y. Supp. 1006. But see Penhallow *v.* Doane, 1795, 3 Dall. (U. S.) 54.

[6] Balls *v.* Haines, 1852, 3 Ind. 461; Peck *v.* McLean, 1886, 36 Minn. 228; 30 N. W. 759; 1 Am. St. Rep. 665; Isom *v.* Johns, 1811, 2 Munf. (Va.) 272; Eubank *v.* Rall's Extr., 1833, 4 Leigh (Va.) 308. And see Catlin *v.* Allen, 1845, 17 Vt. 158.

[7] Bridges *v.* McAlister, 1899, 106 Ky. 791; 51 S. W. 603; 45 L. R. A. 800; 90 Am. St. Rep. 267. But see Reynolds *v.* Hosmer, 1873, 45 Cal. 616.

the payment of money to the creditor, the measure of recovery obviously is the amount paid. Where property, instead of money, is taken by the creditor, he should restore the value of the property at the time of its receipt. Where property of the debtor is sold upon execution and the proceeds paid to the creditor, the measure of recovery, upon principle and by the weight of authority, is the amount actually realized by the creditor, and not the value of the property at the time of sale.[1] In the cases to the contrary,[2] it is pointed out that if the property were sold for less than its value it would be a serious hardship to allow the judgment debtor to recover only the proceeds of the sale. But there seems to be no sufficient reason for shifting the hardship to the shoulders of the judgment creditor, who is benefited only to the extent of the proceeds of the sale.

The obligation to make restitution arises when the judgment is reversed, and interest from that date should be allowed.[3]

Where property is sold in execution of a judgment that is void and not merely erroneous, the judgment creditor is a wrongdoer, and may be required, at the election of the owner, either to pay over the proceeds of the sale with interest from the time of receipt or to compensate him in damages for the loss of the property. And if the latter remedy is chosen, the measure of damages is the value of the property at the time of the sale.[4]

[1] Bridges *v.* McAlister, 1899, 106 Ky. 791; 51 S. W. 603; 45 L. R. A. 800; 90 Am. St. Rep. 267; Schnabel *v.* Waggener, 1904, 118 Ky. 362; 80 S. W. 1125; (but see Maynard *v.* May, 1894, 16 Ky. Law Rep. 690; 25 S. W. 879); Bryant *v.* Fairfield, 1863, 51 Me. 149, 154, (*semble*); Peck *v.* McLean, 1886, 36 Minn. 228; 30 N. W. 759; 1 Am. St. Rep. 665; Gay *v.* Smith, 1859, 38 N. H. 171; Bickerstaff *v.* Dellinger, 1809, 1 Murph. (5 N. C.) 272.

[2] Western *v.* Creswick, 1693–94, 4 Mod. 161; Hays *v.* Cassell, 1873, 70 Ill. 669; Smith *v.* Zent, 1882, 83 Ind. 86; 43 Am. Rep. 61; Thompson *v.* Thompson, 1793, 1 N. J. L. 159; Cleveland *v.* Tufts, 1888, 69 Tex. 580; 7 S. W. 72.

[3] Florence Cotton, etc., Co. *v.* Louisville Banking Co., 1903, 138 Ala. 588; 36 So. 456; 100 Am. St. Rep. 50.

[4] Duff & Repp Furniture Co. *v.* Read, 1906, 74 Kan. 730; 88 Pac. 263.

§ 236. **Same: Reversal on technical grounds.** — Since it is essential to quasi contractual obligation that the defendant shall have received a benefit the retention of which is unjust, it would seem that the reversal of a judgment upon technical grounds not affecting the merits of the issue between the parties is not enough to entitle the appellant to recover, unless supported by positive evidence that the retention of the money collected by the respondent would be unjust. As was said in an early Maryland case,[1] "The plaintiff cannot recover in this case, unless the defendant's retaining the money is contrary to equity and right. The defendant may resort to any equitable or conscientious defense to repel the claim of the plaintiff and may show the justice of his original claim."[2] In a number of cases, however, it is held that a successful appellant is entitled to restitution, whether the reversal affects the merits or not, and that the justice of the claim under which the money was collected is no defense to an action for its recovery.[3]

Assuming that the respondent may justify his retention of the money notwithstanding the reversal of his judgment, he does not do so by showing that he has a distinct cause of action against the appellant in which he is entitled to recover as much as he has received and retains.[4]

[1] Green *v.* Stone, 1803, 1 Har. & J. (Md.) 405, 408.

[2] *Accord:* Duncan *v.* Ware's Extrs., 1833, 5 Stew. & P. (Ala.) 119; 24 Am. Dec. 772; Dupuy *v.* Roebuck, 1845, 7 Ala. 484, (but see Florence Cotton, etc., Co. *v.* Louisville Banking Co., 1903, 138 Ala. 588; 36 So. 456; 100 Am. St. Rep. 50); Teasdale *v.* Stoller, 1896, 133 Mo. 645; 34 S. W. 873; 54 Am. St. Rep. 703; Johnston *v.* Miller, 1898, 31 Nova Scotia 83; Gould *v.* McFall, 1888, 118 Pa. St. 455; 12 Atl. 336; 4 Am. St. Rep. 606.

[3] Florence Cotton, etc., Co. *v.* Louisville Banking Co., 1903, 138 Ala. 588; 26 So. 456; 100 Am. St. Rep. 50; Hier *v.* Anheuser-Busch Brewing Assn., 1900, 60 Neb. 320; 83 N. W. 77; Conover *v.* Scott, 1830, 11 N. J. L. 400; Bickett *v.* Garner, 1876, 31 Oh. St. 28.

[4] Dupuy *v.* Roebuck, 1845, 7 Ala. 484. And see First Nat. Bank *v.* Price, 1902, 65 Kan. 853; 70 Pac. 938; Morgan *v.* Hart, 1848, 9 B. Mon. (48 Ky.) 79.

CHAPTER XVII

CONSTRAINT OF TAX OR ASSESSMENT

§ 237. In general: Vacation or correction of tax or assessment as condition precedent to right of action.
§ 238. (I) What constitutes constraint in collection of tax or assessment:
(1) Duress of person or goods.
§ 239. (2) Sale of real property: Cloud on title.
§ 240. (3) Incumbrance of property.
§ 241. (4) Prevention of recordation of deed.
§ 242. (5) Interference with business: Onerous penalties.
§ 243. (II) Retention of benefit inequitable: Mere irregularities.
§ 244. (III) Necessity of protest: Interest.
§ 245. (IV) Demand and notice.
§ 246. (V) Statutory remedy.

§ 237. **In general: Vacation or correction of tax or assessment as condition precedent to right of action.** — Analogous to the case of money paid in satisfaction of a judgment (*ante*, § 229 *et seq.*) is that of money paid under a void, illegal, or excessive tax or assessment. For boards of assessors and other like bodies are tribunals of a quasi judicial character, and their adjudications have, in a degree, the force and effect of a judgment entered in a court of law.

The method ordinarily employed to compel payment of a tax varies according to the character of the tax itself. State and county taxes on property are usually collected by the summary seizure and sale of personalty or the summary sale of land, while the payment of a license or a franchise tax is commonly coerced by the withdrawal of a privilege or the exaction of a penalty. The obligation to make restitution, however, is in all cases governed by the same principle, and no attempt is made, in the following sections, to give to the various kinds of taxes separate consideration.

Whether or not the action of a board of assessors or a like body must be vacated or corrected before a suit to recover taxes paid may be brought, depends upon the nature of the

defect charged. If the assessors are without jurisdiction, or if the statute under which they act is unconstitutional, or if it appears upon the face of the proceedings that they have failed to comply with the requirements of the statute, it is unnecessary to take steps to set aside their action;[1] but if the assessors, having jurisdiction over the person and property, and acting, so far as the record shows, in compliance with the requirements of a constitutional statute, fall into an error which affects the rights of a person assessed, the vacation or correction of their action, by appeal to the state board of revision or by other proper proceedings instituted for the purpose, is a condition precedent to the right to sue for restitution.[2]

One of the best statements of the distinction is found in *Trimmer* v. *City of Rochester*,[3] an action to recover money paid upon an alleged illegal assessment for street improvements. It appeared that the taxing officers of the defendant had omitted from the assessment roll realty benefited by the improvement, and for this error assessments against the taxpayers who brought actions to set them aside had been adjudged illegal. Said the court:

"There is a broad distinction between an assessment which is illegal by reason of the existence of some fact outside of the record, and one void on the face of the record, for the lack of jurisdiction of the person or property, or by reason of the unconstitutionality of the statute under which the assessment is made. In the latter case, if money is compulsively obtained it may be recovered from the municipality in an action at law

[1] Powder River Cattle Co. *v.* Bd. of Commrs., 1891, 45 Fed. 323, (C. C. Mont.); Brownlee *v.* Marion County, 1880, 53 Ia. 487; 5 N. W. 610; Ross *v.* Supervisors, 1885, 38 Hun (N. Y.) 20: Mutual Life Ins. Co. *v.* Mayer, etc., 1895, 144 N. Y. 494, 39 N. E. 386; Ætna Ins. Co. *v.* Mayor, 1897, 153 N. Y. 331; 47 N. E. 593.

[2] Stanley *v.* Supervisors of Albany, 1886, 121 U. S. 535; 7 S. Ct. 1234; Detroit Savings Bank *v.* Detroit, 1897, 114 Mich. 81; 72 N. W. 14; Clarke *v.* Commrs. of Stearns Co., 1896, 66 Minn. 304; 69 N. W. 25; Mayor, etc., of Jersey City *v.* Riker, 1876, 38 N. J. L. 225; 20 Am. Rep. 386; Trimmer *v.* City of Rochester, 1892, 130 N. Y. 401; 29 N. E. 746; Wharton *v.* Birmingham, 1860, 37 Pa. St. 371.

[3] 1892, 130 N. Y. 401, 405; 29 N. E. 746.

brought by the wronged taxpayer. But in case money is collected under an illegal assessment, it cannot be recovered until the assessment is set aside. . . . The rights of persons from whom money is collected under such assessments are like those of persons from whom money is collected under judgments void; for example, for lack of jurisdiction, and those which are reversible for error. Money collected under void judgments may be recovered without first setting them aside, but that collected under judgments erroneously obtained cannot be until they are reversed.

"It is agreed that the assessment against the realty of the assignor of the plaintiff, and on account of which the money sought to be recovered in this action was paid, has not been set aside, nor have any proceedings or actions been instituted for such purpose. The judgment in *Hassen's* case did not set aside all of the assessments but only those against the property of the plaintiffs in that action, and the assessment against realty of the assignor of the plaintiff was not affected or invalidated by that judgment, and until it is set aside no action can be maintained to recover the sums paid under it."

§ 238. (I) **What constitutes constraint in collection of tax or assessment**: (1) **Duress of person or goods.** — Precisely what facts amount to compulsion, in these tax cases, is a question not free from difficulty. Actual arrest;[1] threats of immediate arrest by one who has apparent authority;[2] seizure and sale of personal property;[3] or seizure alone;[4] or threats

[1] Wheeler *v.* County of Plumas, 1906, 149 Cal. 782; 87 Pac. 802; Dist. of Columbia *v.* Chapman, 1905, 25 App. D. C. 95. But see Bean *v.* Middlesboro, 1900, 22 Ky. Law Rep. 415; 57 S. W. 478.

[2] Town of Magnolia *v.* Sharman, 1885, 46 Ark. 358; Chicago *v.* Klinkert, 1900, 94 Ill. App. 524; Douglas *v.* Kansas City, 1898, 147 Mo. 428; 48 S. W. 851; Neumann *v.* City of La Crosse, 1896, 94 Wis. 103; 68 N. W. 654. And see Buckley *v.* Mayor of N. Y., 1898, 30 App. Div. 463; 52 N. Y. Supp. 452, (*aff.* 159 N. Y. 558; 54 N. E. 1089).

[3] Bailey *v.* Goshen, 1865, 32 Conn. 546; Hennel *v.* Board of Commrs., 1892, 132 Ind. 32; 31 N. E. 462; Dow *v.* First Parish in Sudbury, 1842, 5 Metc. (Mass.) 73; Newman *v.* Supervisors of Livingston County, 1871, 45 N.Y. 676; American Bank *v.* Mumford, 1857, 4 R. I. 478. See Guaranty Trust Co. *v.* City of New York, 1905, 108 App. Div. 192; 95 N. Y. Supp. 770.

[4] Lindsey *v.* Allen, 1897, 19 R. I. 721; 36 Atl. 840.

of immediate seizure;[1] any of these is obviously sufficient (see *ante*, §§ 214, 216). On the other hand, threats of a civil action,[2] or of a criminal prosecution, made under circumstances which do not create a reasonable fear of immediate arrest,[3] are not enough (see *ante*, § 215). Indeed there are cases which insist that nothing short of threats of immediate arrest or seizure of goods will suffice.[4] By the weight of authority,

[1] Dist. of Columbia *v.* Glass, 1906, 27 App. D. C. 576; Howard *v.* Augusta, 1882, 74 Me. 79; First Nat. Bank. *v.* Watkins, 1870, 21 Mich. 483; Lyon *v.* Receiver of Taxes, 1883, 52 Mich. 271; 17 N. W. 839; Dale *v.* City of New York, 1902, 71 App. Div. 227; 75 N. Y. Supp. 576. And see Hubbard *v.* Brainard, 1869, 35 Conn. 563; Woodmere Cemetery Assn. *v.* Township, 1902, 130 Mich. 466; 90 N. W. 277; Kelley *v.* Rhodes, 1898, 7 Wyo. 237; 51 Pac. 593; 39 L. R. A. 594; 75 Am. St. Rep. 904.

[2] Falvey *v.* Board of County Commrs., 1899, 76 Minn. 257; 79 N. W. 302. And see Mayor, etc., of Baltimore *v.* Lefferman, 1846, 4 Gill (Md.) 425; 45 Am. Dec. 145.

[3] Southern R. Co. *v.* Mayor of Florence, 1904, 141 Ala. 493; 37 So. 844; Maxwell *v.* San Louis Obispo, 1886, 71 Cal. 466; 12 Pac. 484; Williams *v.* Stewart, 1902, 115 Ga. 864; 42 S. E. 256; Betts *v.* Village of Reading, 1892, 93 Mich. 77; 52 N. W. 940; Claflin *v.* McDonough, 1863, 33 Mo. 412. But see Hill *v.* Dist. of Columbia, 1889, 18 D. C. (7 Mackey) 481; Harvey *v.* Town of Olney, 1866, 42 Ill. 336.

In Hill *v.* Dist. of Columbia, *supra*, the court said (p. 489): "To say that a man who pays money must be held to have acted freely unless he did it under pressure of *immediate* and *urgent necessity*, suggests a high standard of pluck and manhood, but in transactions with the Government it is not a fair or reasonable test. When a demand is made by an official, known to have at his back, even though he may not threaten to use them, the penalties of the law, the individual citizen does not stand on an equal footing in the dealing."

[4] See Raisler *v.* Mayor of Athens, 1880, 66 Ala. 194; First Nat. Bank of Americus *v.* The Mayor, 1881, 69 Ga. 119; 45 Am. Rep. 476; Commrs. of Wabaunsee County *v.* Walker, 1871, 8 Kan. 431; Mayor, etc., of Baltimore *v.* Lefferman, 1846, 4 Gill (Md.) 425; 45 Am. Dec. 145; Cincinnati, etc., R. Co. *v.* Hamilton County, 1908, 120 Tenn. 1; 113 S. W. 361; Sowles *v.* Soule, 1887, 59 Vt. 131; 7 Atl. 715. In Rumford Chemical Works *v.* Ray, 1896, 19 R. I. 456, 459; 34 Atl. 814, MATTESON, C.J., said: "The origin of the doctrine of 'immediate and urgent' necessity seems to have been the dictum of Lord Kenyon in *Fulham* v. *Down*, 6 Esp. 26, 'that where a voluntary payment was made of an illegal demand, the party knowing the demand to be illegal, without an immediate and urgent necessity (or, as expressed by Mr. Bearcroft, unless to redeem or preserve your person or goods), it is not the subject of an action for money had and received.'"

however, if an officer to whom a warrant has been delivered, authorizing him to seize and sell personal property, or who has himself authority to issue such a warrant, manifests an intention to enforce the payment of the tax by seizure and sale at any time, the owner of the property is under compulsion and may recover money paid for the purpose of preventing such seizure and sale.[1] The following expressions of this view are frequently quoted:

Preston v. *City of Boston*, 1831, 12 Pick. (Mass.) 7: SHAW, C. J. (p. 14): "But the warrant to a collector, under our statute for the assessment and collection of taxes, is in the nature of an execution, running against the person and property of the party, upon which he has no day in court, no opportunity to plead and offer proof, and have a judicial decision of the question of his liability. Where therefore a party not liable to taxation, is called on peremptorily to pay upon such a warrant, and he can save himself and his property in no other way than by paying the illegal demand, he may give notice that he so pays it by duress and not voluntarily, and by showing that he is not liable, recover it back, as money had and received."

Parcher v. *Marathon County*, 1881, 52 Wis. 388; 9 N. W. 23; 38 Am. Rep. 745: LYON, J. (p. 392): "We think it must be held, on principle and authority, that the payment of a demand under compulsion of legal process, such payment being accompanied by a protest that the demand is illegal and that the payer intends to take measures to recover back the money paid, is not a voluntary payment. And further, to constitute compulsion of legal process it is not essential that the officer has seized, or is *immediately* about to seize, the property of the payer by virtue of his process. It is sufficient if the officer demands payment by virtue thereof, and manifests an intention to enforce collection by seizure and sale of the payer's property at any time."

As to payments made before the collecting officer has actually evinced an intention to enforce collection, there is a much

[1] Boston and Sandwich Glass Co. *v.* Boston, 1842, 4 Metc. (Mass.) 181; Atwell *v.* Zeluff, 1872, 26 Mich. 118; St. Anthony Elevator Co. *v.* Soucie, 1900, 9 N. D. 346; 83 N. W. 212; 50 L. R. A. 262; Rumford Chemical Works *v.* Ray, 1896, 19 R. I. 456; 34 Atl. 814.

sharper divergence of judicial opinion.[1] Upon principle and by analogy to the case of money paid upon a judgment (*ante*, § 229 *et seq.*), it would seem that if the collecting officer has no discretion in the matter, but is required by law, in case of non-payment of the tax, to collect the same by the seizure and sale of property, a recovery should be allowed. It is reasonable to assume that the officer will perform his duty, and idle to say that there is no duress until by overt act he has shown his intention so to do. If, on the other hand, the collector is authorized by law to proceed either by summary levy or by an action in which the defendant may appear and contest the validity of the tax, a payment made before the officer has evinced his election to proceed summarily should not be recoverable.[2]

§ 239. (2) **Sale of real property: Cloud on title.** — An actual or threatened sale of real property is not so coercive as one of personalty, since while personalty is actually seized the possession and enjoyment of real property is not immediately affected. The purchaser takes subject to a right of redemption, and even after the expiration of the redemption period he can obtain possession only by an action of ejectment. A tax sale

[1] *Allowing a recovery:* Kansas, etc., R. Co. *v.* Commrs., 1876, 16 Kan. 587; Atchison, etc., R. Co. *v.* Commrs., 1892, 47 Kan. 722; 28 Pac. 999; *In re* Edison Co., 1897, 22 App. Div. 371; 48 N. Y. Supp. 99, (*aff.* 1898, 155 N. Y. 699; 50 N. E. 1116); Allen *v.* Burlington, 1873, 45 Vt. 202. And see Mills' Guardian *v.* City of Hopkinsville, 1889, 11 Ky. Law Rep. 164; 11 S. W. 776; Tuttle *v.* Everett, 1875, 51 Miss. 27; 24 Am. Rep. 622; Bank of Commonwealth *v.* The Mayor, etc., of N. Y., 1780, 43 N. Y. 184. *Contra:* Railroad Co. *v.* Commrs., 1878, 98 U. S. 541; Raisler *v.* Mayor of Athens, 1880, 66 Ala. 194; City of Chicago *v.* Fidelity Bank, 1882, 11 Ill. App. 165; Smith *v.* Readfield, 1847, 27 Me. 145; Wilson *v.* Pelton, 1883, 40 Oh. St. 306; Dunnell Mfg. Co. *v.* Newell, 1886, 15 R. I. 233; 2 Atl. 766. See Conley *v.* City of Buffalo, 1909, 65 Misc. Rep. 100; 119 N. Y. Supp. 87.

In Tennessee, when the tax books are in the hands of the county trustee, they have the force of a judgment and execution, and a payment made under protest may be recovered. Bright *v.* Halloman, 1881, 7 Lea (75 Tenn.) 309. But, though the tax books are in the hands of the trustee, if the taxes are not yet delinquent, payment is held not compulsory. Cincinnati, etc., R. Co. *v.* Hamilton County, 1908, 120 Tenn. 1; 113 S. W. 361.

[2] See Dunnell Mfg. Co. *v.* Newell, 1886, 15 R. I. 233; 2 Atl. 766.

of realty may, however, affect its value by creating a cloud on title. It is therefore held that taxes paid to prevent or remove a cloud on title may be recovered as paid under compulsion.[1]

Under what circumstances a sale for taxes constitutes a cloud on title is not entirely clear. It is generally said that if the invalidity of the tax or assessment appears on the face of the record — as for lack of jurisdiction or by reason of the unconstitutionality of a statute — the sale does not constitute a cloud on title.[2] Said the Supreme Court of California, in *Phelan* v. *San Francisco:*[3]

"The payment of a tax to prevent a threatened sale of real property is not compulsory, unless the conveyance by the officer will have the effect to deprive the owner of some defense to the tax, or throw upon him the burden of showing its illegality. If the officer's want of authority will appear upon the face of

[1] Gill *v.* City of Oakland, 1899, 124 Cal. 335; 57 Pac. 150; City of Denver *v.* Evans, 1906, 35 Colo. 490; 84 Pac. 65; Keehn *v.* McGillicuddy, 1898, 19 Ind. App. 427; 49 N. E. 609; Whitney *v.* City of Port Huron, 1891, 88 Mich. 268; 50 N. W. 316; 26 Am. St. Rep. 291; Amer. Bapt. Miss. Union *v.* Hastings, 1897, 67 Minn. 303; 69 N. W. 1078; Peyser *v.* Mayor of New York, 1877, 70 N. Y. 497; 26 Am. Rep. 624; Vaughn *v.* Village of Port Chester, 1892, 135 N. Y. 460; 32 N. E. 137; Galveston Gas Co. *v.* Galveston, 1881, 54 Tex. 287; Montgomery *v.* Cowlitz County, 1896, 14 Wash. 230; 44 Pac. 259. *Contra:* Lamborn *v.* County Commrs., 1877, 97 U. S. 181, (administering law of Kansas); Falls *v.* City of Cairo, 1871, 58 Ill. 403.

In Gill *v.* City of Oakland, *supra*, it was said that although the plaintiff might have obtained an injunction against the sale of his property, he also had the right to pay under protest and then to bring an action at law to recover the amount paid. But in Hoke *v.* City of Atlanta, 1899, 107 Ga. 416; 33 S. E. 412, restitution was denied on the ground that at the time the payment was made proceedings to enjoin the collection of the tax had been instituted, in which the plaintiff might have joined.

[2] San Francisco, etc., R. Co. *v.* Dinwiddie, 1882, 8 Saw. 312; 13 Fed. 789, (administering law of California); Phelan *v.* San Francisco, 1898, 120 Cal. 1; 52 Pac. 38; Murphy *v.* City of Wilmington, 1880, 6 Houst. (Del.) 108; 22 Am. St. Rep. 345; Sears *v.* Marshall County, 1882, 59 Ia. 603; 13 N. W. 755; Detroit *v.* Martin, 1876, 34 Mich. 170; 22 Am. Rep. 512; Shane *v.* St. Paul, 1880, 26 Minn. 543; 6 N. W. 349; Fleetwood *v.* City of New York, 1849, 2 Sandf. (N. Y. Superior Ct.) 475.

[3] 1898, 120 Cal. 1, 5; 52 Pac. 38.

the deed, or if the illegality of the proceedings will necessarily appear in any attempt by the purchaser to disturb the owner in the possession of the land, a payment to prevent such sale is not made under duress."

But if this test is adopted, the rule that the plaintiff can recover only when the sale creates a cloud on title would seem to be too narrow, since the market value of property may be seriously affected by a sale that does not constitute a technical "cloud." This is recognized in the Michigan case of *Whitney* v. *Port Huron*,[1] in which, referring to the statement in a previous case that a sale of land for the non-payment of an assessment laid under a statute which is unconstitutional and void would not create a cloud upon the owner's title, the court said:

"This may be good law when applied to proceedings under an unconstitutional enactment, which is no law, and is held to confer no rights upon any one, as all must be presumed to know that it is unconstitutional and void; but it cannot be applied to cases where the statute under which the proceedings to levy the tax are taken is constitutional, and where the illegality of the tax is claimed from irregularities or defects in the statutory proceedings. If it were so, it would require of the landowner a greater knowledge of the law than attorneys, or even courts, possess. For instance, in the present case, able attorneys for the defendant are claiming that the tax paid by the plaintiff was a legal one, and that all the proceedings in assessing it were lawful; yet at the same time they argue that, if it should be determined by this Court to be illegal for any reason, then the plaintiff's payment must be considered a voluntary one, and she cannot recover what she has paid, because she and every one else are presumed to know that the tax is void, and that a sale under it could convey no title, and therefore cast no cloud over her title. But the fact remains, as every one knows, that a tax deed or any other purported conveyance of land does cloud the title, and that it can never be sold or exchanged as readily, and seldom for as great a price, as when un-

[1] 1891, 88 Mich. 268, 271; 50 N. W. 316; 26 Am. St. Rep. 291. See also Keener, "Quasi-Contracts," pp. 424–5.

incumbered, although it may be patent to the courts that such a deed or conveyance is void and of no consequence, as far as the holding of the title is concerned; and, in my opinion, the owner of the land has the right, in law and equity, to treat every such tax deed or other conveyance as a cloud upon his title, and to take such steps to get rid of it, or to prevent its issue or record, as the law authorizes, when the title is actually clouded, as defined by some of the authorities. A cloud upon a title is but an apparent defect in it. If the title, sole and absolute in fee, is really in the person moving against the cloud, the density of the cloud can make no difference in the right to have it removed. Anything of this kind that has a tendency, even in a slight degree, to cast doubt upon the owner's title, and to stand in the way of a full and free exercise of his ownership, is, in my judgment, a cloud upon his title which the law should recognize and remove."

§ 240. (3) **Incumbrance of property.** — Where a tax is by statute made a lien on property, the payment of the tax, although invalid, in order to remove the apparent lien, may be regarded as a payment under compulsion (*ante* § 217). This is exemplified, in the case of a lien on personalty, by the decision in *Ætna Ins. Co.* v. *The Mayor*.[1] The action was to recover money paid for taxes illegally imposed upon bank stock owned by the plaintiff, the statute providing that such taxes should be and remain a lien thereon from the day when the property was assessed. The New York Court of Appeals allowed a recovery, saying:

"As this tax became and remained a lien upon the plaintiff's bank stock, even after a transfer, it deprived it of an essential element of its ownership and of its right to transfer it. That being the effect of the imposition of the tax, we think it amounted to such an impounding or duress of the plaintiff's property as to render the payment so far involuntary as to authorize an action for the recovery of the money thus wrongfully received by the defendant."

[1] 1897, 153 N. Y. 331, 340; 47 N. E. 593.

Since, however, the assertion of an invalid lien upon personal property may not interfere with its use and enjoyment, it would seem that the owner should be required to show some special circumstances, such as an urgent necessity to sell the property or to raise money on its security, constraining him to extinguish the lien by payment instead of by the slower process of legal proceedings for its cancellation.

To the case of a tax lien on real property the same considerations apply. The existence of an apparent lien does not in itself constitute duress. But if a sale of the property is threatened, or if no means are afforded for obtaining within a reasonable time the extinguishment of the lien by legal proceedings,[1] or if there are other coercive circumstances, payment should be regarded as compulsory.

§ 241. (4) **Prevention of recordation of deed.** — In some States the recorder is required by statute to refuse to accept a deed for record until the county auditor shall have certified that the taxes upon the land have been paid. There is a difference of opinion as to whether taxes paid to enable the owner of land to have his deed recorded may be recovered as paid under compulsion. In Minnesota a recovery is allowed, the Supreme Court saying, in *State* v. *Nelson:*[2]

"The inducements which the law thus imposes upon a grantee of lands to pay a tax of inconsiderable amount, rather than suffer his title to valuable lands to be thus jeopardized, may well be deemed to amount to compulsion. The coercion is certainly as real, and of substantially the same nature, as in the case of a distress of goods. Indeed, men of ordinary prudence would not generally hesitate to pay at once such a demand as is involved in this tax, rather than to incur the risk of losing their entire estates by not placing their deeds on record."

But the Supreme Court of Michigan, notwithstanding its liberal attitude in the case of taxes paid to prevent a threatened

[1] See Tozer *v.* Skagit County, 1904, 34 Wash. 147; 75 Pac. 638.

[2] 1889, 41 Minn. 25, 29; 42 N. W. 548. *Accord:* Oakland Cemetery Assn. *v.* County of Ramsey, 1906, 98 Minn. 404; 108 N. W. 857; 116 Am. St. Rep. 377.

sale of land (*ante*, § 239), has expressed, in *Weston* v. *Luce County*,[1] its disapproval of the decision in *State* v. *Nelson*. The two cases are distinguishable, however, in that the taxes were paid by the owner, in *Weston* v. *Luce County*, not to enable him to record the deed by which he acquired title, but in order that a deed by him to a prospective purchaser might be recorded. Conceding that this makes the case somewhat closer than *State* v. *Nelson*, it is believed that a recovery ought to have been permitted, since the knowledge of a prospective purchaser that he would be unable to secure the recordation of his deed without the payment of the tax would undoubtedly operate to lessen the price obtainable for the land.

§ 242. (5) **Interference with business: Onerous penalties.** — A threatened interference with the business of the taxpayer sometimes is,[2] and sometimes is not,[3] held to constitute duress

[1] 1894, 102 Mich. 528; 61 N. W. 15.

[2] Swift Co. *v.* United States, 1884, 111 U. S. 22, 29; 4 S. Ct. 244, (Internal revenue tax. Mr. Justice MATTHEWS: "The only alternative was to submit to an illegal exaction, or discontinue its business. It was in the power of the officers of the law, and could only do as they required."); Atchison, etc., R. Co. *v.* O'Connor, 1912, U. S. ; 32 S. C. 216 (tax on foreign corporation); County of La Salle *v.* Simmons, 1849, 10 Ill. 513, ("gift" to county in order to get reissue of ferry license); Chicago *v.* Waukesha Brewing Co., 1900, 97 Ill. App. 583, (license tax paid on threat of police to prevent corporation from continuing business); Scottish Ind. Co. *v.* Herriott, 1899, 109 Ia. 606; 80 N. W. 665; 77 Am. St. Rep. 548, (payment of license tax by foreign corporation in order to continue doing business in State); Cunningham *v.* Monroe, 1860, 15 Gray (Mass.) 471, (head money paid to secure entry at customs house); *cf.* Cunningham *v.* Boston, 1860, 15 Gray (Mass.) 468, (head money paid in order to land passengers); City of Vicksburg *v.* Butler, 1878, 56 Miss. 72, (threat to close up shop); *cf.* Jackson *v.* Newman, 1882, 59 Miss. 385, (privilege tax: threat to stop hack); Catoir *v.* Watterson, 1882, 38 Ohio St. 319, (liquor license: statute provided fine and imprisonment).

[3] Emery *v.* Lowell, 1879, 127 Mass. 138, (illegal increase in liquor license); C. & J. Michel Brewing Co. *v.* State, 1905, 19 S. D. 302; 103 N. W. 40; 70 L. R. A. 911, (license tax on non-resident wholesalers of liquors); City of Houston *v.* Feeser, 1890, 76 Tex. 365; 13 S. W. 266, (butcher's license tax); Custin *v.* City of Viroqua, 1886, 67 Wis. 314; 30 S. W. 515, (liquor license paid to prevent closing of business). And see Yates *v.* Royal Ins. Co., 1902, 200 Ill. 202; 65 N. E. 726, (tax paid by foreign insurance company to continue business in State).

— the question depending in a large measure, no doubt, upon the extent of the damage that may result, the imminence of the danger, the availability of reasonably prompt judicial protection, and other circumstances (see *ante*, § 218). In this connection it is noticeable that the courts seem less disposed to permit the recovery of an illegal license tax when it is paid to secure the privilege of opening a new business, than when paid to prevent the closure or interruption of a business already established.

Though there be no danger that one's place of business will be closed, or that its conduct will be otherwise directly interfered with, if the penalty imposed by the law for non-payment of the tax is an onerous one, payment of the tax is regarded as compulsory:

Robertson v. *Frank Brothers Company*, 1889, 132 U. S. 17; 10 Sup. Ct. 5: A customs appraiser required an importer to add certain charges to the invoices of goods and declared that whenever such charges should be omitted by the importer, they would be added by the appraisers and a penalty of twenty per cent of the whole duty imposed and exacted. The importer made the addition required and paid under protest the increased duty that resulted. Mr Justice BRADLEY (p. 24): "In our judgment, the payment of money to an official, as in the present case, to avoid an onerous penalty, though the imposition of the penalty might have been illegal, was sufficient to make the payment an involuntary one."

Ratterman v. *American Express Company*, 1892, 49 Oh. St. 608; 32 N. E. 754: An Ohio statute made it a criminal offense punishable by imprisonment for any person to transact business for an express company that failed to pay the taxes assessed against it, and imposed a penalty upon any railroad company that should carry goods for such express company. To avoid the consequences of a violation of the statute, the American Express Company paid an illegal tax on its gross receipts from interstate business. It was subsequently allowed by the Supreme Court of Ohio to recover the amount paid, the court saying (p. 621): "A failure to comply with the requirement of the statute as to the payment of the tax, would have imperiled the existence of the company's business; and to save its busi-

ness in this state, and, to a large extent in the United States from destruction, it was necessary to avoid the statutory penalties and disabilities. . . . With the obvious danger in view that employees, and others independent of and beyond the control of the express company would be deterred by the penalties, and refuse to carry for it packages, parcels, or merchandise in the line of its business, a payment of the tax by the company might well be deemed to have been made under duress or coercion, and without waiver by the company of its day in court." [1]

There are cases which hold that if the threatened penalty, no matter how burdensome, can be enforced only through the medium of an action at law in which the taxpayer will have an opportunity to contest the validity of the tax, payment to avoid the penalty is not compulsory.[2] Perhaps the most conspicuous is *Oceanic Steam Navigation Company* v. *Tappan*.[3] A statute of New York imposed a tax upon alien passengers, to be collected from the owner of the ship by which they were landed. If the owner failed to make a certain report he was liable to a fine of seventy-five dollars for each passenger; if he did report, he was required to pay one dollar and fifty cents for each passenger, or was liable, if required by the mayor, to give onerous bonds, and in case of default to pay a penalty of five hundred dollars for each bond withheld. In order to avoid these penalties the plaintiff complied with the law, and subsequently, the act having been declared unconstitutional, sought to recover the taxes paid. The court conceded that the penalties would aggregate such an enormous sum as ordinarily to bankrupt a shipowner, and that it was consequently natural for the plaintiff to pay the tax rather than run the risk of litigation, but never-

[1] Also: Maxwell *v.* Griswold, 1850, 10 How. (U. S.) 241; Western Union Tel. Co. *v.* Mayer, 1876, 28 Ohio St. 521; City of Marshall *v.* Snediker, 1860, 25 Tex. 460; 78 Am. Dec. 534. And see Bergmeyer *v.* Greenup County, 1898, 19 Ky. Law Rep. 1599; 44 S. W. 82.

[2] Oceanic Steam Navigation Co. *v.* Tappan, 1879, 16 Blatchf. (U. S. C. C.) 296; Fed. Cas., No. 10,405; Benson *v.* Monroe, 1851, 7 Cush. (Mass.) 125; 54 Am. Dec. 716; Boston, etc., Ins. Co. *v.* Hendricks, 1903, 41 Misc. Rep. 478; 85 N. Y. Supp. 44.

[3] 1879, 16 Blatchf. (U. S. C. C.) 296; Fed. Cas., No. 10,405.

theless decided that since the penalties could only have been collected by suit and the plaintiff was therefore sure of his day in court, the tax was not paid under "legal coercion," and consequently could not be recovered. These decisions apparently overlook the vital distinction between the ordinary case of a threatened suit and the case of an onerous penalty. In the former the execution of the threat cannot possibly result in serious hardship, for in the event of an adverse decision only the amount originally demanded, with the addition of interest and costs, must be paid. In the latter, on the other hand, an actual attempt to collect the penalty may, in the event of a determination adverse to the taxpayer, impose upon him a burden so heavy as to cripple his business or even make him a bankrupt. But, says the court in *Oceanic Steam Navigation Company* v. *Tappan*,[1] "The party paying is bound to know the law and to assume that it will be correctly administered by the tribunal which is to decide the controversy." Here are two conclusive presumptions of law, based upon considerations of public policy. With the first — that every one knows the law — we are not now concerned, since there is no claim that payment is made in ignorance of or under a mistake of law. As to the second — that every question will be correctly decided by the courts — it is submitted that there is no consideration of justice or public policy that requires its application to the cases under consideration. It is difficult, indeed, to conceive of an act of more obvious injustice and unwisdom than to compel one to assume the risk of an adverse judicial decision, when not merely the amount of money involved in the original controversy but a penal sum so great as to endanger the very existence or solvency of his business, is at stake.

§ 243. (II) **Retention of benefit inequitable.** — In order to raise an obligation to make restitution, it must appear, of course, that the money paid has actually been received by the defendant,[2]

[1] 16 Blatchf. (U. S. C. C.) 299.

[2] First Nat. Bank of Americus *v.* The Mayor, 1881, 68 Ga. 119; 45 Am. Rep. 476; Otis *v.* People, 1902, 196 Ill. 542; 63 N. E. 1053; Thompson *v.* City of Detroit, 1897, 114 Mich. 502; 72 N. W. 320.

and that its retention is unjust. It follows that mere irregularities in the mode of assessment, not affecting the validity of the tax, or in the mode of collection, will not entitle the taxpayer to recover.[1] In fact, the collection of a valid tax by means of an unlawful arrest, while it may amount to a tort by the officer, creates no quasi contractual obligation to make restitution.[2] If, in the case of an irregular assessment, the taxpayer is compelled to pay more than his fair proportion of the tax, the excess may be recovered.[3]

§ 244. (III) **Necessity of protest: Interest.** — Protest will not make an otherwise voluntary payment involuntary.[4] On the other hand, protest is not an essential element of compul-

[1] Goddard *v.* Seymour, 1862, 30 Conn. 394; Jackson *v.* Town of Union, 1909, 82 Conn. 266; 73 Atl. 773; Supervisors *v.* Manny, 1870, 56 Ill. 160; Commrs. *v.* Armstrong, 1883, 91 Ind. 528; Hinds *v.* Township of Belvidere, 1895, 107 Mich. 664; 65 N. W. 544; Long *v.* Village of Dundee, 1909, 159 Mich. 320; 123 N. W. 1098.

[2] Foss *v.* Whitehouse, 1901, 94 Me. 491; 48 Atl. 109; Dunbar *v.* City of Boston, 1873, 112 Mass. 75.

[3] Fletcher Paper Co. *v.* City of Alpena, 1910, 160 Mich. 462; 125 N. W. 405. See also Jackson *v.* Town of Union, 1909, 82 Conn. 266; 73 Atl. 773, 774.

[4] Railroad Co. *v.* Commrs., 1878, 98 U. S. 541; Dear *v.* Varnum, 1889, 80 Cal. 86; 22 Pac. 76; Monaghan *v.* Lewis, 1905, 5 Pennewill (Del.) 218; 59 Atl. 948; Conkling *v.* City of Springfield, 1890, 132 Ill. 420; 24 N. E. 67; Benson *v.* Monroe, 1851, 7 Cush. (Mass.) 125; 54 Am. Dec. 716; Robins *v.* Latham, 1896, 134 Mo. 466; 36 S. W. 33; Peebles *v.* City of Pittsburg, 1882, 101 Pa. St. 304; 47 Am. Rep. 714. But see Herold *v.* Kahn, 1908, 159 Fed. 608; 86 C. C. A. 598, in which Judge Gray said (p. 612): "The proper administration of the fiscal affairs of the government, require that the payment of taxes should not be delayed by disputes as to their legality, but that the taxes should first be paid and all questions in regard to them be determined in suits brought for their refunding. It is a wise policy, therefore, that encourages the payment under protest of disputed taxes. Though there is some conflict in the dicta of the Supreme Court, we think that the true doctrine is that, when taxes are paid under protest that they are being illegally exacted, or with notice that the payor contends that they are illegal and intends to institute suit to compel their repayment, a sufficient foundation for such a suit has been established. Chesebrough *v.* U. S., 192 U. S. 253; City of Phila. *v.* Collector, 5 Wall. 720, 731." See also Thomas *v.* City of Burlington, 1886, 69 Ia. 140; 28 N. W. 480; Dunnell Mfg. Co. *v.* Newell, 1886, 15 R. I. 233; 2 Atl. 766.

sion.[1] The law does not require a man to protest when a protest obviously would be useless (*ante*, § 221). Protest may, however, be evidence of the payor's attitude,[2] and it has been held that in the absence of a protest interest may be recovered only from the time of demand or action brought,[3] instead of from the time of payment, as it otherwise may be.[4]

§ 245. (IV) **Demand and notice.** — Demand is not a condition precedent to the right to recover void taxes paid to a municipality under compulsion;[5] but if it is desired to hold the collecting officer personally responsible he should be notified, at the time the tax is paid, or at least before the money is turned over by him, that such is the intention of the payor.[6]

§ 246. (V) **Statutory remedy.** — In a number of States the return of illegal, excessive, and void taxes is expressly authorized by statute.[7] Such statutes are regarded as mandatory, and public

[1] Meek *v.* McClure, 1875, 49 Cal. 623, (not necessary if officer has notice of illegality); Jenks *v.* Lima Township, 1861, 17 Ind. 326, (protest evidence that payment made under duress; *cf.* Town of Ligonier *v.* Ackerman, 1874, 46 Ind. 552; 15 Am. Rep. 323); Howard *v.* Augusta, 1882, 74 Me. 79; Boston Glass Co. *v.* Boston, 1842, 4 Metc. (Mass.) 181; Atwell *v.* Zeluff, 1872, 26 Mich. 118; Cox *v.* Welcher, 1888, 68 Mich. 263; 36 N. W. 69; 13 Am. St. Rep. 339; De Graff *v.* County of Ramsey, 1891, 46 Minn. 319; 48 N. W. 1135.

[2] See Yates *v.* Royal Ins. Co., 1902, 200 Ill. 202; 65 N. E. 726; Jenks *v.* Lima Township, 1861, 17 Ind. 326.

[3] Boston Glass Co. *v.* Boston, 1842, 4 Metc. (Mass.) 181; Atwell *v.* Zeluff, 1872, 26 Mich. 118.

[4] Erskine *v.* Van Arsdale, 1872, 15 Wall. (U. S.) 75; Boston, etc., R. Co. *v.* State, 1885, 63 N. H. 571; 4 Atl. 571; Galveston County *v.* Galveston Gas Co., 1889, 72 Tex. 509; 10 S. W. 583.

[5] Bruecher *v.* Village of Port Chester, 1886, 101 N. Y. 240; 4 N. E. 272; Ætna Ins. Co. *v.* Mayor, etc., of New York, 1897, 153 N. Y. 331; 47 N. E. 593.

[6] Erskine *v.* Van Arsdale, 1872, 15 Wall. (U. S.) 75; City of Vicksburg *v.* Butler, 1878, 56 Miss. 72. But see Ford *v.* Holden, 1859, 39 N. H. 143; Frye *v.* Lockwood, 1825, 4 Cow. (N. Y.) 454.

[7] White *v.* Smith, 1898, 117 Ala. 232; 23 So. 525; Hayes *v.* County of Los Angeles, 1893, 99 Cal. 74; 33 Pac. 766; Barber *v.* County of Jackson, 1891, 40 Ill. App. 42; Board of Commrs. of Pulaski County *v.* Senn, 1888, 117 Ind. 410; 20 N. E. 276; Lauman *v.* County of Des Moines, 1870, 29 Ia. 310; People *v.* Whemple, 1892, 133 N. Y. 617; 30 N. E. 1002; Matter of Adams *v.* Supervisors, 1898, 154 N. Y. 619; 49 N. E. 144.

officers and boards may be compelled by mandamus or similar proceeding to execute their provisions.[1] Some of the statutes are by their terms limited in operation to taxes paid or collected under protest.[2] Where no such limitation is expressed, proof of protest or coercion would seem to be unnecessary;[3] but there is authority to the contrary.[4]

[1] White *v.* Smith, 1898, 117 Ala. 232; 23 So. 525; Pacific Coast Co. *v.* Wells, 1901, 134 Cal. 471; 66 Pac. 657; Curtis *v.* Pocahontas County, 1887, 72 Ia. 151; 33 N. W. 616; People ex rel. *v.* Supervisors of Otsego County, 1873, 51 N. Y. 401; *In re* L. E. Waterman Co., 1901, 33 Misc. Rep. 569; 68 N. Y. Supp. 892.

[2] Knowles *v.* Boston, 1880, 129 Mass. 551; Western Ranches *v.* Custer County, 1903, 28 Mont. 278; 72 Pac. 659; Bankers Life Assn. *v.* Commrs., 1901, 61 Neb. 202; 85 N. W. 54; N. C. R. Co. *v.* Commrs. of Alamance, 1877, 77 N. C. 4; Centennial Eureka Min. Co. *v.* Juab County, 1900; 22 Utah 395; 62 Pac. 1024.

[3] Pacific Coast Co. *v.* Wells, 1901, 134 Cal. 471; 66 Pac. 657; City of Indianapolis *v.* Vajen, 1887, 111 Ind. 240; 12 N. E. 311; Robinson *v.* City of Burlington, 1878, 50 Ia. 240; Matter of Adams *v.* Supervisors, 1898, 154 N. Y. 619; 49 N. E. 144, (but see Matter of McCue *v.* Supervisors, 1900, 162 N. Y. 235; 56 N. E. 627.

[4] Matter of McCue *v.* Supervisors, 1900, 162 N. Y. 235; 56 N. E. 627.

CHAPTER XVIII

CONSTRAINT OF AN OBLIGATION WHICH, IN WHOLE OR IN PART, DEFENDANT OUGHT TO HAVE DISCHARGED

§ 247. In general.
§ 248. (I) Discharge of defendant's obligation to prevent sale of plaintiff's property.
§ 249. Same: *England* v. *Marsden* and *Edmunds* v. *Wallingford.*
§ 250. Same: Must seizure of plaintiff's property be lawful?
§ 251. (II) Discharge of defendant's obligation by sale or sacrifice of plaintiff's property.
§ 252. (III) Discharge of defendant's obligation by plaintiff as co-obligor: In general.
§ 253. (1) Right of surety to indemnity.
§ 254. (2) Right of surety to contribution.
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§ 256. Same: Limits of rule.
§ 257. Same: Upon principle.
§ 258. (4) Right of tort-feasor to indemnity.
§ 259. (5) Nature of tort-feasor's right to contribution or indemnity.

§ 247. **In general.** — It has been seen that one who, under circumstances raising a moral duty, voluntarily discharges another's obligation, may recover in quasi contract for the benefit thereby conferred (*ante,* § 193 *et seq.*). *A fortiori,* one is entitled to recover when such discharge of another's obligation is compelled by law. The compulsion may result either from the fact that the plaintiff's property is subject to sale or his interests are prejudiced in case the defendant's obligation is not performed, or from the fact that the plaintiff is himself legally bound to perform the duty which, as between the plaintiff and the defendant, rests in equity and good conscience upon the latter. The benefit to the defendant is not less real because it consists of a saving of expenditure rather than an addition to his estate (*ante,* § 8).

§ 248. (I) **Discharge of defendant's obligation to prevent sale of plaintiff's property.** — It is well settled that money paid in discharge of another's obligation in order to prevent a sale of one's property or the sacrifice of one's property interests is recoverable:

Exall v. *Partridge*, 1799, 8 Term R. 308: Action against three lessees of certain premises to recover rent paid by the plaintiff in order to prevent the sale of his carriage which had been left on the premises in the care of one of the defendants and had been distrained by the landlord. LE BLANC, J. (p. 311): "The three defendants were all by their covenant bound to see that the rent was paid; by their default in not seeing that it was paid, the plaintiff's goods were distrained for a debt due from the three defendants to Welch [the landlord]; by compulsion of law he was obliged to pay that debt; and, therefore, I think he has his remedy against the three persons who by law were bound to pay, and who did not pay this money."

Among the cases which most frequently arise are those of the payment, by the owner, tenant, or mortgagee of property, of taxes or assessments on the property which are the obligation of another;[1] the payment, by the purchaser of property, of a mortgage which ought to be paid by the seller;[2] the payment, by a mortgagee, of the wages of a ship's crew or of other

[1] Dawson *v.* Linton, 1822, 5 Barn. & Ald. 521; Irvine *v.* Angus, 1899, 93 Fed. 629; 35 C. C. A. 501; Smith *v.* Rountree, 1900, 185 Ill. 219; 56 N. E. 1130; Greer *v.* McCarter, 1869, 5 Kan. 17; Phinney *v.* Foster, 1905, 189 Mass. 182; 75 N. E. 103; Dana *v.* Colby, 1884, 63 N. H. 169; Graham *v.* Dunigan, 1858, 2 Bosw. (N. Y. Super. Ct.) 516; Hogg *v.* Langstreth, 1881, 97 Pa. St. 255; Iron City Tool Works *v.* Long, 1886, (Pa.) 7 Atl. 82; Childress *v.* Vance, 1872, 1 Baxt. (60 Tenn.) 406; Spokane *v.* Security Sav. Soc., 1907, 46 Wash. 150; 89 Pac. 466, (payment of general taxes by muncipality to protect its lien for a street assessment); Childs *v.* Smith, 1909, 51 Wash, 457; 99 Pac. 304; 130 Am. St. Rep. 1107, (*aff.* on rehearing 1910, 58 Wash. 148; 107 Pac. 1053). *Contra:* William Ede Co. *v.* Heywood, 1908, 153 Cal. 615; 96 Pac. 81; 22 L. R. A. (N. S.) 562, (strong dissenting opinion by Justice SHAW).

[2] Treat *v.* Craig, 1901, 135 Cal. 91; 67 Pac. 7; Weiss *v.* Guerineau, 1886, 109 Ind. 438; 9 N. E. 399; Sargent *v.* Currier, 1870, 49 N. H. 310; 6 Am. Rep. 524; McIntyre *v.* Ward, 1846, 18 Vt. 434.

claims against a ship.[1] But there are various other cases in which the same obligation is enforced.[2]

§ 249. **Same: England v. Marsden, and Edmunds v. Wallingford.** — In the case of *England* v. *Marsden* it was held by the English Court of Common Pleas, that a recovery would not be allowed where goods distrained and redeemed were upon the premises of the defendant for the benefit of the owner of the goods and without the request of the defendant:

England v. *Marsden*, 1866, L. R. 1 C. P. 529: Action to recover money paid to redeem household furniture and goods of the plaintiff distrained by the defendant's landlord for rent. The plaintiff had taken possession of the goods under a bill of sale or mortgage from the defendant, but had allowed the goods to remain upon the premises of the defendant. ERLE, C.J. (p. 532): "The plaintiff having seized the goods under the bill of sale, they were his absolute property. He had a right to take them away; indeed it was his duty to take them away. He probably left them on the premises for his own purposes, in order that he might sell them to more advantage. At all events they were not left there at the request or for the benefit of the defendant. It is to my mind precisely the same as if he had placed the goods upon the defendant's premises without the defendant's leave, and the landlord had come in and distrained them."

[1] Johnson *v.* Royal Mail Steam Packet Co., 1867, L. R. 3 C. P. 38; The Orchis, 1890, 15 P. D. 38; The Heather Bell, [1901] P. 143. And see Goodridge *v.* Lord, 1813, 10 Mass. 483.

[2] Murphey *v.* Davey, 1884, L. R. 14 Ir. 28, (payment of rent by sub-tenant of part of premises to prevent eviction); Walker *v.* Smith, 1856, 28 Ala. 569, (payment of jail fees by owner of slaves who had run away from hirer); Henderson *v.* Welch, 1846, 3 Gilm. (8 Ill.) 340, (payment of costs of litigation by one who was party of record but not in interest); Keith *v.* Congregational Parish, 1838, 21 Pick. (Mass.) 261, (payment of parish debt by parishioner); Nichols *v.* Bucknam, 1875, 117 Mass. 488, (payment of contractor's debt for labor by owner of building); Hoadley *v.* Dumois, 1895, 11 Misc. Rep. 52; 31 N. Y. Supp. 853, (payment of debt of charterer of vessel by consignee of cargo); Bailey *v.* Bishop, 1910, 152 N. C. 383; 67 S. E. 968 (payment by plaintiff for sidewalk he was compelled to lay, for which defendant had bound himself to pay). And see Volker *v.* Fisk, 1909, 75 N. J. Eq. 497; 72 Atl. 1011.

Two reasons for denying relief are here suggested: first, that in order to support an implied promise by the defendant it must appear that he *requested* that the goods be left on his premises, or at least that they were left there for his benefit; and second, that the plaintiff was in a position analogous to that of a wrongdoer or an officious volunteer, in that he had no right to leave the goods on the premises. Both arguments appear to be unsound. The first confuses quasi contractual obligation with the obligation of a genuine promise implied from a request or from other conduct of the parties. The second assumes that the goods were left on the premises without the *consent* of the defendant, a fact which certainly does not appear in the record. It is believed, therefore, that the limitation cannot be supported upon principle; and, as a matter of fact, it has failed to command the support of more recent authority:

Edmunds v. *Wallingford*, 1885, 14 Q. B. D. 811: LINDLEY, L.J., referring to *England* v. *Marsden* (p. 816). "This appears to us a very questionable decision. The evidence did not shew that the plaintiff's goods were left in the defendant's house against his consent; and although it is true that the plaintiff only had himself to blame for exposing his goods to seizure, we fail to see how he thereby prejudiced the defendant, or why, having paid the defendant's debt in order to redeem his own goods from unlawful seizure, the plaintiff was not entitled to be reimbursed by the defendant."

§ 250. **Same: Must seizure of plaintiff's property be lawful?** — In the carefully considered case of *Edmunds* v. *Wallingford*,[1] it was declared to be necessary to the plaintiff's right of action that the seizure of his goods shall have been lawful, *i.e.* it must appear " that as between the owner of the goods and the person seizing them, the latter shall have been entitled to take them." And in the Maryland case of *Myers* v. *Smith*,[2] the plaintiff's failure to show the lawfulness of the seizure led to a denial of

[1] 1885, 14 Q. B. D. 811, 816.

[2] 1867, 27 Md. 91. And see Stevens *v.* Smith, 1907, 112 N. Y. Supp. 361.

relief. The logic of this limitation is not apparent, since an unlawful seizure, especially if believed to be lawful, may be just as coercive as a lawful one. Its only justification is that in case of an unlawful seizure the owner of the goods may recover from the *recipient* money paid to release them. But there would seem to be no harm in allowing an alternative remedy against the obligor, and moreover, as Professor Keener points out,[1] to allow such a remedy against the obligor would tend to prevent circuity of action, since a recovery by the owner of the property against the payee would lead to renewed proceedings for the enforcement of the obligation. It need hardly be added that the obligation of the defendant discharged by the plaintiff's payment must be a valid and subsisting one.

§ 251. (II) **Discharge of defendant's obligation by sale or sacrifice of plaintiff's property.** — If money paid to prevent the sale of one's property in satisfaction of another's obligation may be recovered, it follows that in case of an actual sale the owner may either purchase his own property at such sale,[2] or permit it to be purchased by a third person, and recover the purchase price from the obligor.[3]

It should be noted that the law may compel one indirectly to discharge another's obligation without a sale or a threatened sale of one's goods. Thus, the assignee for value of a chose in action may have his judgment diminished by a claim of set-off against the assignor of which the assignee had no notice. This amounts to a compulsory sacrifice of the assignee's property in the discharge of the assignor's obligation, and if the contract of assignment affords no remedy against the assignor the assignee may recover in quasi contract:

[1] Keener, "Quasi-Contracts," p. 395.

[2] Wells *v.* Porter, 1831, 7 Wend. (N. Y.) 119; Hunt *v.* Amidon, 1842, 4 Hill (N. Y.) 345; 40 Am. Dec. 283.

[3] Edmunds *v.* Wallingford, 1885, 14 Q. B. D. 811, (action by the trustee in bankruptcy of two sons of the defendant to recover the amount realized by the sale of goods which, as between the father and his sons, belonged to the sons, but which, because of circumstances estopping the sons from denying their father's title, had been sold by the sheriff under a judgment against the father). And see Sargent *v.* Currier, 1870, 49 N. H. 310; 6 Am. Rep. 524.

Ticonic Bank v. *Smiley*, 1847, 27 Me. 225: Assumpsit by the pledgees of a note against the payee, who had indorsed it "indorser not holden," to recover the sum of $51.80, which sum was due from the said payee to the maker of the note on an account and was set off by the maker when sued on the note by the pledgees. WHITMAN, C.J. (p. 229): "But, by the operation of law, the plaintiffs have been compelled, in effect, to pay a debt due from him [defendant]. . . . The plaintiffs, not being apprised of any such claim in set-off, were entitled to find the note free from any such claim; but by the operation of law were, nevertheless, compelled to pay a debt, which in equity and good conscience the defendant should have kept from being so claimed and paid. He may therefore be considered as having in effect, requested, or perhaps more properly, as having compelled the plaintiffs to pay the amount claimed."

§ 252. (III) **Discharge of defendant's obligation by plaintiff as co-obligor: In general.** — It is an accepted principle that one who, in the discharge of his own legal obligation, has done that which as between himself and another rested in equity and good conscience upon the latter, is entitled to restitution of the benefit thereby conferred.[1] The most frequent and important application of the principle is to cases (1) of indemnity of sureties by their principals, (2) of contribution between sureties or other co-contractors, (3) of contribution between joint tort-feasors, and (4) of indemnity of tort-feasors. This is not the place for a comprehensive treatment of these, but the nature of the obligation will be briefly considered.

§ 253. (1) **Right of surety to indemnity.** — The obligation of the principal debtor, in the absence of an express undertaking, to indemnify his surety, had its origin in equity.[2] Lord MANSFIELD had no hesitation, however, in enforcing it at law in an action for money paid to the principal's use:

[1] Brown *v.* Hodgson, 1811, 4 Taunt. 189, (plaintiff, a carrier, who had misdelivered goods to defendant instead of to P. and who paid P. the value of the goods, allowed to recover from defendant); Brittain *v.* Lloyd, 1845, 14 Mees. & Wels. 762, (auctioneer who had paid duty allowed to recover from his employer); Lewis *v.* Campbell, 1849, 8 C. B. 541.

[2] Layer *v.* Nelson, 1687, 1 Vern. 456.

Decker v. *Pope*, 1757, 1 Selw. N. P. 76 n.: "Lord *Mansfield* directed the jury to find for the plaintiff; observing, that where a debtor desires another person to be bound with him or for him, and the surety is afterwards obliged to pay the debt, this is a sufficient consideration to raise a promise in law, and to charge the principal in an action for money paid to his use."

Lord MANSFIELD'S statement that the obligation of the principal arises upon *payment* by the surety indicates clearly a quasi contractual character. In a number of cases it appears to have been so regarded.[1] That it has come to be treated generally as a genuine implied contract, however, is evidenced by the abundant authority which holds that the obligation arises when the surety becomes bound, rather than when the surety pays.[2]

[1] Toussaint *v.* Martinnant, 1787, 2 Term R. 100; Townsend *v.* Sullivan, 1906, 3 Cal. App. 115; 84 Pac. 435; Vermeule *v.* York Cliffs Improvement Co., 1909, 105 Me. 350; 74 Atl. 800; 134 Am. St. Rep. 553; Norton *v.* Coons, 1851, 6 N. Y. 33; Tobias *v.* Rogers, 1855, 13 N. Y. 59; Johnson *v.* Harvey, 1881, 84 N. Y. 363; 38 Am. Rep. 515; Oldham *v.* Broom, 1874, 28 Oh. St. 41; Aldrich *v.* Aldrich, 1883, 56 Vt. 324; 48 Am. Rep. 791.

"Again, it is an equitable principle of very general application that where one person is in the situation of a mere surety for another, whether he became so by actual contract or by operation of law, if he is compelled to pay the debt which the other in equity and justice ought to have paid, he is entitled to relief against the other, who was in fact the principal debtor. And when courts of law, a long time since, fell in love with a part of the jurisdiction of the court of chancery and substituted the equitable remedy of an action of assumpsit upon the common money counts, for the more dilatory and expensive proceedings by a bill in equity in certain cases, they permitted the person thus standing in the situation of surety, who had been compelled to pay money for the principal debtor, to recover it back again from the person who ought to have paid it, in this equitable action of assumpsit as for money paid, laid out, and expended for his use and benefit."—WALWORTH, Ch., in Hunt *v.* Amidon, 1842, 4 Hill (N. Y.) 345, 348; 40 Am. Dec. 283.

[2] *In re* Stout, 1900, 109 Fed. 794, (D. C. Mo.); Keel *v.* Larkin, 1882, 72 Ala. 493; Choteau *v.* Jones, 1849, 11 Ill. 300; 50 Am. Dec. 460; Sargent *v.* Salmond, 1847, 27 Me. 539; Appleton *v.* Bascom, 1841, 3 Metc. (Mass.) 169; Labbe *v.* Bernard, 1907, 196 Mass. 551; 82 N. E. 688; 14 L. R. A. (N. S.) 457 (*semble*); Loughridge & Bogan *v.* Bowland, 1876, 52 Miss. 546; Carlisle *v.* Rich, 1835, 8 N. H. 44,

§ 254. (2) **Right of surety to contribution.** — The obligation of a surety to contribute, like that of the principal to indemnify his surety, was first recognized in equity [1] and then adopted by courts of law.[2] It is frequently said to be equitable in its nature and to rest upon "general principles of justice," [3] or upon the principle that sureties "are all *in æquali jure*, and as the law requires equality they shall equally bear the burden." [4] This has been thought to mean that the obligation is really quasi contractual.[5] Theoretically, without doubt, it is a proper case for the application of the quasi contractual doctrine under consideration in this chapter, for, in so far as one surety pays more than his *aliquot* share of the debt, he performs an obligation which in equity and good conscience rests upon his co-surety, and thereby confers a benefit upon the latter which it is unjust for him to retain.

The theory of a quasi contractual foundation, however, directly encounters the accepted rule of equity that a surety, as soon as the creditor's claim against him is established, and without first paying the debt, may bring a bill to compel his co-surety to contribute with him,[6] and the rule of both law and equity that if a surety dies after entering into the contract of

(*semble*); Blanchard *v.* Blanchard, 1908, 61 Misc. Rep. 497; 113 N. Y. Supp. 882; *aff.* 1909, 133 App. Div. 937; 118 N. Y. Supp. 1095; Graeber *v.* Sides, 1909, 151 N. C. 596; 66 S. E. 600; Poe *v.* Dixon, 1899, 60 Oh. St. 124; 54 N. E. 86; 71 Am. St. Rep. 713, (*semble*); Barney *v.* Grover, 1856, 28 Vt. 391. But see, *contra*, Townsend *v.* Sullivan, 1906, 3 Cal. App. 115; 84 Pac. 435.

[1] Offley and Johnson's Case, 1584, 2 Leo. 166; Layer *v.* Nelson, 1687, 1 Vern. 456.

[2] Turner *v.* Davis, 1796, 2 Esp. 479; Cowell *v.* Edwards, 1800, 2 Bos. & Pul. 268.

[3] Conover *v.* Hill, 1875, 76 Ill. 342.

[4] Deering *v.* Earl of Winchelsea, 1787, 2 Bos. & Pul. 270; Weeks *v.* Parsons, 1900, 176 Mass. 570; 58 N. E. 157; Board of Commrs. *v.* Dorsett, 1909, 151 N. C. 307; 66 S. E. 132; Fischer *v.* Gaither, 1898, 32 Or. 161; 51 Pac. 733.

[5] See Keener, "Quasi-Contracts," pp. 401, 402.

[6] Wolmershausen *v.* Gullick, [1893] 2 Ch. 514; Morrison *v.* Poyntz, 1838, 7 Dana (37 Ky.) 307; 32 Am. Dec. 92. See also Robinson *v.* Harkin, [1896] 2 Ch. 415, (contribution between trustees); Hodgson *v.* Baldwin, 1872, 65 Ill. 532.

suretyship but before any payment is made, his estate is liable to the co-surety who subsequently pays the debt.[1]

Some of the cases in support of this last proposition indicate with particular clearness that for the purpose of a remedy at law the obligation is regarded as purely contractual:

Johnson v. *Harvey*, 1881, 84 N. Y. 363; 38 Am. Rep. 515: FINCH, J. (p. 365): "It was held in *Bradley* v. *Burwell* (3 Den. 61), that the death of one of two or more sureties did not relieve his estate from the liability to contribute, and the decision was put upon the ground that the law implies a contract between co-sureties to contribute ratably toward discharging any liability which they may incur in behalf of their principal, such contract originating at the time they execute the original undertaking, and that in the case of the death of either this obligation devolves upon his legal representatives, and is like any other contract made by one, in his lifetime, to pay money at a future time, absolutely or contingently, who dies before any breach of the contract."

Chipman v. *Morrill*, 1862, 20 Cal. 130; FIELD, C.J. (p. 135): "In support of the first position, the appellant cities various authorities upon the doctrine of contribution as between co-sureties, to the effect that such doctrine depends more upon a principle of equity than upon contract. Such is undoubtedly the case as between co-sureties, and the principle is, that where there is a common liability, equality of burthen is equity. Courts of equity, therefore, naturally took jurisdiction of cases of contribution, where one surety had paid more than his just proportion. But the equitable doctrine, in the progress of time, became so well established, that parties were presumed to enter into contracts of suretyship upon its knowledge; and consequently, upon a mutual understanding that if the principle failed, each would be bound to share with the others a proportionate loss. Courts of common law thereupon assumed

[1] Handley *v.* Helfin, 1888, 84 Ala. 600; 4 So. 725; Hecht *v.* Skaggs, 1890, 53 Ark. 291; 13 S. W. 930; 22 Am. St. Rep. 192; Wood *v.* Leland, 1840, 1 Metc. (Mass.) 387; Johnson *v.* Harvey, 1881, 84 N. Y. 363; 38 Am. Rep. 515; Aiken *v.* Peay's Extrs., 1850, 5 Strobh. (S. C.) 15; 53 Am. Dec. 684; Pace *v.* Pace's Admr., 1898, 95 Va. 792; 30 S. E. 361; 44 L. R. A. 459.

jurisdiction to enforce contribution between sureties, proceeding on the principle that from their joint undertaking there was an implied promise on the part of each surety to contribute his share, if necessary, to make up the common loss." [1]

The genuine implied contract theory may be thought to be likewise supported by the rule generally adopted by courts of law, differing from that in equity, as to the measure of contribution — that each surety is liable for a proportionate part of the loss, according to the number of sureties originally bound, whether or not all are alive and solvent at the time the debt is paid.[2] As a matter of fact Lord CAMPBELL, in *Batard* v. *Hawes*, expressly based this rule upon the contract theory.[3] But the true reason for it, as recognized in many of the cases, is that the liability of the sureties being several, " the law cannot, in such complicated cases, do complete justice by one final determination; and therefore it did not undertake it." [4]

On the other hand, it seems clear that the obligation cannot logically rest on the notion of a genuine implied contract, since

[1] *Accord:* Craythorne *v.* Swinburne, 1807, 14 Ves. Jr. 160; Norton *v.* Coons, 1851, 6 N. Y. 33.

[2] Brown *v.* Lee, 1827, 6 Barn. & Cres. 689; *In re* MacDonaghs, 1876, Ir. R. 10 Eq. 269; Moore *v.* Bruner, 1889, 31 Ill. App. 400; Stothoff *v.* Dunham's Exrs., 1842, 19 N. J. L. 181; Easterly *v.* Barber, 1876, 66 N. Y. 433; Powell *v.* Matthis, 1843, 4 Ired. L. (26 N. C.) 83; 40 Am. Dec. 427; Fischer *v.* Gaither, 1898, 32 Or. 161; 51 Pac. 736; Riley *v.* Rhea, 1880, 5 Lea (73 Tenn.) 115; Acers *v.* Curtis, 1887, 68 Tex. 423; 4 S. W. 551. See Sloan *v.* Gibbes, 1900, 56 S. C. 480; 35 S. E. 408; 76 Am. St. Rep. 559, (equity rule).

[3] Batard *v.* Hawes, 1853, 2 Ell. & Bl. 287, 296. Lord CAMPBELL, C.J.: "If the right of contribution is to be considered as arising merely from the fact of payment being made, so as to relieve a party jointly liable from legal liability, we should have to look to the number of contractors actually liable at law at the time of making the payment which relieved them from liability. But we think that it is not merely the legal liability to the creditor at the time of the payment which we are to regard, but that we must look to the implied engagement of each, to pay his share, arising out of the joint contract when entered into."

[4] RUFFIN, C.J., in Powell *v.* Matthis, 1843, 4 Ired. (26 N. C.) 83, 85; 40 Am. Dec. 427. See also Easterly *v.* Barber, 1876, 66 N. Y. 433.

contribution will be enforced under circumstances which conclusively negative the existence of contract, as where two sureties become such by separate instruments and are entire strangers to each other,[1] or where they become sureties by the same instrument but at different times.[2] In neither of these cases can there be said to be any evidence of an intention to enter into a contribution contract, and moreover, in the latter no consideration can be found to support such a contract, since the one who first becomes surety surrenders no right when the other subsequently assumes the obligation.

In conclusion, it may be said that while the law of contribution between sureties might well have been erected upon the quasi contractual doctrine considered in this chapter, it is difficult to show, in the light of the adjudged cases, that it actually has been built upon that or, indeed, upon any other single doctrine. In equity, as has been said, the obligation is referred to the so-called principle that where there is a common liability the burden should be equal. At common law, the courts have generally regarded it as contractual, although in practice sometimes appearing to confuse contractual with quasi contractual obligation, and at other times, falling back on the somewhat indefinite principle of equity just referred to.

§ 255. (3) **Right of tort-feasor to contribution.** — It has long been a familiar maxim that as between joint tort-feasors contribution will not be enforced. This exception to the general

[1] Deering *v.* Earl of Winchelsea, 1787, 2 Bos. & Pul. 270; s. c. 1 Cox 318; Craythorne *v.* Swinburne, 1807, 14 Ves. Jr. 160; Mayhew *v.* Crickett, 1818, 2 Swans.185; *In re* Sir J. J. Ennis, [1893] 3 Ch. 238; Cobb *v.* Haynes, 1847, 8 B. Mon. (47 Ky.) 137; Craig & Angle *v.* Ankeney, 1846, 4 Gill (Md.) 225; Young *v.* Shunk, 1883, 30 Minn. 503; 16 N. W. 402; Barnes *v.* Cushing, 1901, 168 N. Y. 542; 61 N. E. 902; National Surety Co. v. Di Marsico, 1907, 55 Misc. Rep. 302; 105 N. Y. Supp. 272; Bright *v.* Lennon, 1880, 83 N. C. 183; Robinson *v.* Boyd, 1889, 60 Oh. St. 57; 53 N. E. 494; Thompson *v.* Dekum, 1898, 32 Or. 506; 52 Pac. 517, 755; Harris *v.* Ferguson, 1831, 2 Bailey L. (S. C.) 397; Rudolf *v.* Malone, 1899, 104 Wis. 470; 80 N. W. 743.

[2] Golsen *v.* Brand, 1874, 75 Ill. 148; Chaffee *v.* Jones, 1837, 19 Pick. (Mass.) 260; Warner *v.* Morrison, 1862, 3 Allen (Mass.) 566; Norton *v.* Coons, 1851, 6 N. Y. 33; Stovall *v.* Border Grange Bank, 1883, 78 Va. 188.

rule had its origin in *Merryweather* v. *Nixan*,[1] decided in 1799 and commonly referred to as the leading case on the subject. One Sharkey had brought an action on the case against the plaintiff and defendant in this case, for an injury done by them to his reversionary estate in a mill, in which was included a count in trover for the machinery belonging to the mill, and having recovered judgment, collected the whole amount thereof from the present plaintiff, who thereupon brought this action for contribution. Lord KENYON held that the plaintiff was properly nonsuited, but did not state the grounds upon which he based his decision, merely remarking that " he had never before heard of such an action having been brought where the former recovery was for a tort," and adding that his decision " would not affect cases of indemnity, where one man employed another to do acts, not unlawful in themselves, for the purpose of asserting a right."

The maxim is now subject to so many limitations that, stated without qualification, it can hardly be regarded as a rule of law.[2]

§ 256. **Same: Limits of rule.** — As between parties who have committed acts which they knew or ought to have known were wrongful, the rule is uniformly and unhesitatingly applied.[3]

[1] 8 Term R. 186. The exception was foreshadowed in Battersey's case, 1623, Winch 48.

[2] In Bailey *v.* Bussing, 1859, 28 Conn. 455, 459, ELLSWORTH, J., said: "Indeed we think this maxim too much broken in upon at this day to be called with propriety a rule of law, so many are the exceptions to it."

[3] Arnold *v.* Clifford, 1835, 2 Sumn. (U. S. C. C.) 238; Fed. Cas., No. 555, (libel); Wanack *v.* Michels, 1905, 215 Ill. 87; 74 N. E. 84, (statutory liability for injury resulting from sale of liquor); Sutton *v.* Morris, 1898, 102 Ky. 611; 19 Ky. Law Rep. 1654; 44 S. W. 127, (wrongful cutting and carrying away timber); Avery *v.* Central Bank, 1909, 221 Mo. 71; 119 S. W. 1106, (misappropriation of bank's funds); Johnson *v.* Torpy, 1892, 35 Neb. 604; 53 N. W. 575; 37 Am. St. Rep. 447, (sale of liquor to known habitual drunkard); Sharp *v.* Call, 1903, 69 Neb. 72; 95 N. W. 16; 96 N. W. 1004, (misappropriation of corporate funds); Bigelow *v.* Old Dominion, etc., Co., 1908, 74 N. J. Eq. 457; 71 Atl. 153, 176, (plaintiff, a corporation promoter, had been compelled to account for secret profit); Peck *v.* Ellis, 1816, 2 Johns. Ch. (N. Y.) 131, (fraudulent conversion of timber); Miller *v.* Fenton, 1844, 11 Paige (N. Y.) 18, (misappropriation of bank's funds); Davis *v.*

As between parties who are legally responsible for a wrong, not because they authorized or actually participated in its commission, but because of their relation to the actual wrongdoer, the rule is generally held inapplicable, and contribution is enforced.[1] The same is true when, although the parties authorized or actually participated in such an infringement of another's legal rights as constitutes a tort, they acted in good faith and are not chargeable with knowledge that their action was wrongful.[2]

Gelhaus, 1886, 44 Ohio St. 69; 4 N. E. 593, (embezzlement); Fakes *v.* Price, 1907, 18 Okl. 413; 89 Pac. 1123, (judgment for fraud in management of corporation: court allows contribution as to costs); Boyer *v.* Bolender, 1889, 129 Pa. St. 324; 18 Atl. 127; 15 Am. St. Rep. 723, (misappropriation of corporate funds); Rhea *v.* White, 1859, 3 Head (40 Tenn.) 121, (conversion of slaves); Spaulding *v.* Oakes, 1869, 42 Vt. 343, (failure to restrain animal known to be vicious: evidently regarded as equivalent to intentional wrong); Atkins *v.* Johnson, 1870, 43 Vt. 78; 5 Am. Rep. 260, (libel). And see Hunt *v.* Lane, 1857, 9 Ind. 248, and Anderson *v.* Saylors, 1859, 3 Head (40 Tenn.) 551, in which the nature of the act does not appear. But see Fort Scott *v.* Kansas City, etc., R. Co., 1903, 66 Kan. 610; 72 Pac. 238, in which a recovery was allowed under a statute authorizing contribution between joint judgment debtors.

[1] Wooley *v.* Batte, 1826, 2 Car. & P. 417, (negligence of servant); Pearson *v.* Skelton, 1836, 1 Mees. & Wels. 504, (negligence of servant); Ankeny *v.* Moffett, 1887, 37 Minn. 109; 33 N. W. 320, (injury resulting from fall of building due to negligence of owners or their agents); Horbach's Admrs. *v.* Elder, 1851, 18 Pa. St. 33, (negligence of servant). See Bailey *v.* Bussing, 1859, 28 Conn. 455, 459, in which ELLSWORTH, J., said: "We must look for personal participation, personal culpability, personal knowledge. If we do not find these circumstances, but perceive only a liablity in the eye of the law, growing out of a mere relation to the perpetrator of the wrong, the maxim of law that there is no contribution among wrongdoers is not to be applied."

[2] Vandiver *v.* Pollak, 1893, 97 Ala. 467; 12 So. 473; 19 L. R. A. 628, (levy on goods); Farwell *v.* Becker, 1889, 129 Ill. 261; 21 N. E. 792; 6 L. R. A. 400; 16 Am. St. Rep. 267, (attachment of goods); Jacobs *v.* Pollard, 1852, 10 Cush. (Mass.) 287; 57 Am. Dec. 105, (seizure of cattle by plaintiff and sale by defendant); Smith *v.* Ayrault, 1888, 71 Mich. 475; 39 N. W. 724; 1 L. R. A. 311, (infringement of patent); First Nat. Bank *v.* Avery Planter Co., 1903, 69 Neb. 329; 95 N. W. 622; 111 Am. St. Rep. 541; Schappel *v.* First Nat. Bank, 1908, 80 Neb. 708; 115 N. W. 317, (attachment); Acheson *v.* Miller, 1853, 2 Ohio St. 203; 59 Am. Dec. 663, (levy on goods). See Torpy *v.* Johnson, 1895, 43 Neb. 882; 62 N. W. 253, (sale of liquor to habitual drunkard).

Whether the rule applies to cases of mere *negligence*, is not settled. The House of Lords, in an interesting Scotch case, enforced contribution:

Palmer v. *Wick & Pulteneytown Steam Shipping Co.*, [1894] A. C. 318: Palmer, a stevedore, was engaged in discharging pig iron from the shipping company's vessel when one of his workmen was killed by the fall of a block, part of the ship's tackle. The tackle was defective and was negligently used by the appellant. A joint judgment against Palmer and the company was paid in full by the latter, which then brought this action for contribution. Lord HERSCHELL, L.C. (p. 323): "It is not necessary in this appeal to decide whether there can be any right to contribution in the case of a delict proper when the liability has arisen from a conscious and therefore moral wrong, nor even whether in every case of quasi-delict a delinquent may obtain relief against his co-delinquent, though I see, as at present advised, no reason to differ from the opinion, which I gather my noble and learned friend Lord Watson holds, that such a right may exist. . . .

"Much reliance was placed by the learned counsel for the appellant upon the judgment in the English case of *Merryweather* v. *Nixan* [8 Term R. 186]. The reasons to be found in Lord Kenyon's judgment, so far as reported, are somewhat meager, and the statement of the facts of the case not less so. It is now too late to question that decision in this country; but when I am asked to hold it to be part of the law of Scotland, I am bound to say that it does not appear to me to be founded on any principle of justice or equity, or even of public policy, which justifies its extension to the jurisprudence of other countries. There has certainly been a tendency to limit its application, even in England. . . . The doctrine that one tort-feasor cannot recover from another is inapplicable to a case like that now under consideration." [1]

[1] But see The Englishman and The Australia, [1895] P. 212, in which BRUCE, J., said (p. 218): "I do not think that the observations [of Lord Herschell] were intended to mean that, wherever the act done by joint tort-feasors was not in itself unlawful, an indemnity is to be implied from the mere fact that one tort-feasor has paid, under compulsion, the whole damages arising from the tort."

The courts of several States, also, have enforced contribution.[1] On the other hand, there are a number of authorities which favor the view that cases of negligence fall within the rule of no contribution, one of the most important being a decision of the United States Supreme Court:

Union Stock Yards Co. v. *Chicago, etc., R. Co.*, 1905, 196 U. S. 217: 25 S. Ct. 226: Action for indemnity. The defendant had delivered to the plaintiff a defective car, the defect being one that was discoverable upon reasonable inspection. A servant of the plaintiff was injured by reason of the defect and received a judgment against the plaintiff for damages on the ground that his injury was caused by the plaintiff's negligence.

Mr. Justice DAY (p. 227): "The case then stands in this wise: The railroad company and the terminal company have been guilty of a like neglect of duty in failing to properly inspect the car before putting it in use by those who might be injured thereby. . . . The terminal company, because of its fault, has been held liable to one sustaining an injury thereby. We do not think the case comes within that exceptional class which permits one wrongdoer who has been mulcted in damages to recover indemnity or contribution from another." [2]

[1] Nickerson *v.* Wheeler, 1875, 118 Mass. 295, (liability of officers of corporation for neglect to file annual certificate required by law); Ankeny *v.* Moffett, 1887, 37 Minn. 109; 33 N. W. 320, (liability for injury resulting from fall of building due to negligence of owners or their agents); Armstrong County *v.* Clarion County, 1870, 66 Pa. St. 218; 5 Am. Rep. 368, (traveler injured as result of negligence of plaintiff and defendant counties in maintenance of bridge); Thweatt *v.* Jones, 1823, 1 Rand. (Va.) 328; 10 Am. Dec. 538, (tobacco inspectors, by mistake or negligence, delivered receipts and tobacco to person other than owner). And see Mayberry *v.* Northern Pacific R. Co., 1907, 100 Minn. 79; 110 N. W. 356; Eaton & Prince Co. *v.* Mississippi, etc., Trust Co., 1906, 123 Mo. App. 117; 100 S. W. 551, (plaintiff's employee fatally injured through negligent running of elevator, while working in building belonging to defendant: statute in Missouri allows contribution between codefendants in tort actions: dictum that contribution would be allowed in this case at common law); Gulf, etc., R. Co. *v.* Galveston, etc., R. Co., 1892, 83 Tex. 509; 18 S. W. 956.

[2] Also: Atlanta, etc., R. Co. *v.* Southern, etc., Co., 1901, 107 Fed. 874, (C. C. Ga.); Forsythe *v.* Los Angeles R. Co., 1906, 149 Cal. 569; 87 Pac. 24; Central of Georgia R. Co. *v.* Macon R. & Light Co., 1911, 9 Ga. App. 628; 71 S. E. 1076; Gregg *v.* Page Belting Co., 1897, 69

§ 257. **Same: Upon principle.** — As a matter of justice between individuals, the case of tort-feasors is not distinguishable from that of cocontractors. Contribution is denied in the former case, however, for reasons of public policy. These reasons, which are substantially the same as have led to the denial of relief to parties to illegal contracts, are stated in another section (*ante*, § 135). As to persons guilty of conscious and willful torts, they may be sufficient (but see *ante*, § 135). But they have very little force when applied to persons who are innocent of moral wrong. Even though such persons, as a result of negligence or misapprehension of their rights, have committed a tort, they cannot upon any adequate ground of public policy be denied the right to contribution.[1]

§ 258. (4) **Right of tort-feasor to indemnity.** — The rules governing contribution between tort-feasors (*ante*, §§ 255, 256) apply, *mutatis mutandis*, to cases of indemnity. Thus, whether an agent who has committed a tort under the direction of his principal may recover indemnity from the principal depends upon the moral responsibility of the agent. If he knew or ought to have known that his act was wrongful he will not be allowed indemnity.[2] But if he acted in good faith and without any intention of violating another's rights, he will be permitted to shift the consequences of the tort to the shoulders of his principal, where as between the two it should justly fall.[3] Again, while

N. H. 247; 46 Atl. 26; Andrews *v.* Murray, 1861, 33 Barb. (N. Y. Sup. Ct.) 354; Galveston, etc., R. Co. *v.* Nass, 1900, 94 Tex. 255; 59 S. W. 870; Texas, etc., R. Co. *v.* Corr, 1910, Tex. Civ. App. 130 S. W. 185; Walton, Witten, & Graham *v.* Miller's Admx., 1909, 109 Va. 210; 63 S. E. 458; 132 Am. St. Rep. 908; Tacoma *v.* Bonnell, 1911, 65 Wash. 505; 118 Pac. 642; 36 L. R. A. (N. S.) 582.

[1] See article by T. W. Reath, "Contribution between Persons jointly charged for Negligence — Merryweather *v.* Nixan," 12 Harv. Law Rev. 176.

[2] See Nelson *v.* Cork, 1856, 17 Ill. 443; Sutton *v.* Morris, 1898, 102 Ky. 611; 19 Ky. Law Rep. 1654; 44 S. W. 127; Coventry *v.* Barton, 1819, 17 Johns. (N. Y.) 142; 8 Am. Dec. 376; Culmer *v.* Wilson, 1896, 13 Utah 129; 44 Pac. 833; 57 Am. St. Rep. 713.

[3] Adamson *v.* Jarvis, 1827, 4 Bing. 66, (conversion of goods by plaintiff, an auctioneer, under order of defendant); Betts *v.* Gibbons,

one who has actually authorized the commission of a tort by his agent or servant is obviously not entitled to indemnity, one who has not authorized a wrongful act but is held liable to the persons injured merely because of his relationship to the agent or servant who committed it, will be allowed to seek indemnity.[1]

It should be added that indemnity is frequently sought where the relation of principal and agent or master and servant does not exist, but where, nevertheless, as between the tort-feasors, one is primarily responsible for the wrong and ought to bear the consequences. The case of injuries resulting from a negligently maintained sidewalk is typical. Both the property owner and the municipality are legally responsible to the person injured, but as between the two the blame lies at the door of the owner. In this and similar cases, if the party who is not actually or primarily at fault is compelled to respond in damages, he may have indemnity from the other.[2] So far is this principle carried

1834, 2 Ad. & E. 57, (conversion of goods by agent under order of principal); Moore *v.* Appleton, 1855, 26 Ala. 633, (plaintiff dispossessed third person under authority of defendant); Gower *v.* Emory, 1841, 18 Me. 79, (attachment of goods by deputy sheriff); Culmer *v.* Wilson, 1896, 13 Utah 129; 44 Pac. 833; 57 Am. St. Rep. 713, (trespass by agent or trustee); Hoggan v. Cahoon, 1903, 26 Utah 444; 73 Pac. 512; 99 Am. St. Rep. 837, (trespass by agent in seizing goods upon which defendant claimed to have a chattel mortgage).

[1] Bradley *v.* Rosenthal, 1908, 154 Cal. 420; 97 Pac. 875; 129 Am. St. Rep. 171, (negligence of defendant Rosenthal in selecting telephone poles); Bailey *v.* Bussing, 1859, 28 Conn. 455, (negligence of stage driver); Georgia, etc., R. Co. *v.* Jossey, 1898, 105 Ga. 271; 31 S. E. 179, (negligence of baggage master in delivering trunk at wrong station); Grand Trunk R. Co. *v.* Latham, 1874, 63 Me. 177, (misconduct of conductor to passenger); Costa *v.* Yochim, 1900, 104 La. 170; 28 So. 992, (negligence of driver); Lane *v.* Fenn, 1909, 65 Misc. R. 336; 120 N. Y. Supp. 237; San Antonio *v.* Smith, 1900, 94 Tex. 266; 59 S. W. 1109, (tenants of city sewer farm improperly diverting sewage into creek); Kampmann *v.* Rothwell, 1908, 101 Tex. 535; 109 S. W. 1089; 17 L. R. A. (N. S.) 758, (negligence of contractor in building sidewalk); Gaffner *v.* Johnson, 1905, 39 Wash. 437; 81 Pac. 859; Glover *v.* Richardson & Elmer Co., 1911, 64 Wash. 403; 116 Pac. 861.

[2] Washington Gas Light Co. *v.* District of Columbia, 1896, 161 U. S. 316; 16 S. Ct. 564, (municipality obliged to pay damages resulting from defective sidewalk); Schneider *v.* Augusta, 1903, 118 Ga. 610; 45 S. E. 459, (municipality *v.* property owner); Gridley *v.* City of

that it is declared that "as to the two negligent parties, if the negligence of one was merely passive, or was such as only to produce the occasion, and the other negligent party was the

Bloomington, 1873, 68 Ill. 47, (city was compelled to pay damages resulting from defective sidewalk); Canton *v.* Torrance, 1909, 151 Ill. App. 129, (municipality *v.* property owner); McNaughton *v.* Elkhart, 1882, 85 Ind. 384, (city *v.* abutting owner); Veazie *v.* Penobscot R. Co., 1860, 49 Me. 119, (city *v.* railroad for injuries resulting from obstructing highway); Baltimore, etc., R. Co. *v.* Howard County, 1909, 111 Md. 176; 73 Atl. 656, *aff.* on second appeal 1910, 113 Md. 404; 77 Atl. 930, (railroad had rendered highway dangerous by relocating tracks; held liable though county commrs. knew of facts); Gray *v.* Boston Gas Light Co., 1873, 114 Mass. 149; 19 Am. Rep. 324, (defendant, without permission of plaintiff, attached to plaintiff's chimney a wire which ultimately caused it to fall and injure a horse and wagon; plaintiff was obliged to pay damage and brought action for indemnity); Churchill *v.* Holt, 1879, 127 Mass. 165; 34 Am. Rep. 355, (occupant of building compelled to pay damages resulting from open hatchway left open by defendant's servant); Boston *v.* Coon, 1900, 175 Mass. 283; 56 N. E. 287, (municipality *v.* contractors building on lot abutting on city street); City of Detroit *v.* Chaffee, 1888, 70 Mich. 80; 37 N. W. 882, (city *v.* property owner); Minneapolis Mill Co. *v.* Wheeler, 1883, 31 Minn. 121; 16 N. W. 698, (plaintiff as owner of premises obliged to pay damages resulting from defective bridge which defendant should have kept in repair); Independence *v.* Missouri, etc., R. Co., 1901, 86 Mo. App. 585, (municipality *v.* railroad: defective crossing); Oceanic Steam Nav. Co. *v.* Compania Transatlantica Espanola, 1892, 134 N. Y. 461; 31 N. E. 987; 30 Am. St. Rep. 685, (lessee of pier obliged to pay damages resulting from defective door which sub-lessee should have repaired); Phœnix Bridge Co. *v.* Creem, 1905, 102 App. Div. 354; 92 N. Y. Supp. 855, (contractor *v.* subcontractor); New York *v.* Corn, 1909, 133 App. Div. 1; 117 N. Y. Supp. 514, (city *v.* property owner); New York *v.* Hearst, 1911, 142 App. Div. 343; 126 N. Y. Supp. 917, (city *v.* campaign comm. for negligent discharge of fireworks); Gregg *v.* Wilmington, 1911, 155 N. C. 18; 70 S. E. 1070, (city *v.* contractor using street); Grand Forks *v.* Paulsness, 1909, 19 N. D. 293; 123 N. W. 878, (city *v.* contractor using street); Ashley *v.* Lehigh, etc., Coal Co., 1911, 232 Pa. 425; 81 Atl. 442, (city *v.* abutting owner); Corsicana *v.* Tobin, 1900, 23 Tex. Civ. App. 492; 57 S. W. 319, (city *v.* abutting owner); Pullman Co. *v.* Hoyle, 1909, 52 Tex. Civ. App. 534; 115 S. W. 315, (R. Co. *v.* Pullman Co., for causing passenger to alight before arrival at station); Seattle *v.* Puget Sound Imp. Co., 1907, 47 Wash. 22; 91 Pac. 255, (city *v.* abutting owner). See Nashua Iron & Steel Co. *v.* Worcester, etc., R. Co., 1882, 62 N. H. 159, where it was held that a plaintiff who by reason of his and the defendant's negligence has been compelled to pay damages to

active perpetrator of the wrong, the former may recover over against the latter." [1]

§ 259. (5) **Nature of the tort-feasor's right to indemnity or contribution.** — In so far as the right of a tort-feasor to indemnity or contribution has been recognized, it is enforced both in equity and at law. When there is no express contract, it is commonly rested upon the theory of an implied contract between the parties. Indeed, in an English admiralty case it is declared, in substance, that unless the circumstances raise an implied promise the right to indemnity does not exist.[2] But in some cases, as for example where the wrong consists of a mere unintentional neglect of duty, there can hardly be said to be an implication of a genuine promise of indemnity or contribution. In such cases, the obligation may well be rested upon quasi contractual principles, for in so far as one tort-feasor pays what in equity and good conscience another tort-feasor ought to pay, the latter receives a benefit at the expense of the former, the retention of which is unjust.

another, may recover indemnity, although but for his own negligence the injury would not have happened, if at the time it occurred he could not, and the defendant could, have prevented it by ordinary care. *Cf.* Union Stock Yards Co. *v.* Chicago, etc., R. Co., 1905, 196 U. S. 217; 25 S. Ct. 226; Wilhelm *v.* Defiance, 1898, 58 Ohio St. 56; 50 N. E. 18; 40 L. R. A. 294; 65 Am. St. Rep. 745.

[1] Austin, etc., R. Co. *v.* Faust, 1911, Tex. Civ. App. ; 133 S. W. 449, 453.

[2] The Englishman and The Australia, [1895] P. 212.

PART IV

ACTION FOR RESTITUTION AS ALTERNATIVE REMEDY FOR REPUDIATION OR BREACH OF CONTRACT AND FOR TORT

CHAPTER XIX

ACTION FOR RESTITUTION AS ALTERNATIVE REMEDY FOR REPUDIATION OR BREACH OF CONTRACT

§ 260. In general: Is the obligation quasi contractual?
§ 261. (I) Origin of the doctrine.
§ 262. (II) Scope of the doctrine:
(1) Application to cases of goods sold or services rendered.
§ 263. (2) Application to cases of repudiation and to cases of substantial breach.
§ 264. (3) Application to cases of contracts under seal.
§ 265. (III) Restitution by plaintiff as condition precedent.
§ 266. (IV) What constitutes an election.
§ 267. (V) The necessity of notice or demand: Statute of limitations.
§ 268. (VI) Measure of recovery.
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§ 260. **In general: Is the obligation quasi contractual?** — It is a general rule that upon the repudiation, or (in America) the substantial breach, of a contract by one party, the other may elect to "rescind the contract" and recover the value of his performance. The use of the word "rescission" in this connection is unfortunate and confusing. In its true meaning rescission signifies the abrogation or annulment of a contract either by decree of court or mutual consent of the parties. No such abrogation or annulment is essential to the right to restitution, though courts have sometimes been misled by the term "rescission" to believe otherwise. What the term really means, when used with reference to the right to restitution, is

that, upon the repudiation or substantial breach of a contract, the injured party may elect to *disregard* his contract — that is, to quit performance on his own side, refuse to accept further performance by the other party, and relinquish his right to compensatory damages measured by reference to the terms of the contract,— and demand restitution in value for what he has done.[1]

This right to restitution would seem to be in reality nothing more than an alternative remedial right arising from the violation of the contract. Accurately speaking, therefore, it is not a quasi contractual right. The only primary obligation is the obligation to perform the contract; the only primary right the right to such performance. As in the case of the action for restitution as an alternative remedy for certain torts (*post*, § 270 *et seq.*), however, it has been commonly regarded as quasi contractual, and for that reason may be considered in this treatise.

§ 261. (I) **Origin of the doctrine.** — In the earlier days of the common law the only remedy for breach of contract was the action for compensatory damages. The right to elect restitution instead of compensation appears to have been recognized for the first time in 1721;[2] but it was not thoroughly established until Lord MANSFIELD's day. In most of the early cases the action was for the recovery of money paid on contracts subsequently repudiated by the defendant. It was in a case of this sort, *Towers* v. *Barrett*,[3] that Lord MANSFIELD said: "I am a great friend of the action for money had and received; it is a very beneficial action, and founded on principles of eternal

[1] "A fallacy may possibly lurk in the use of the word 'rescission.' It is perfectly true that a contract, as it is made by the joint will of two parties can only be rescinded by the joint will of the two parties, but we are dealing here, not with the right of one party to rescind the contract, but with his right to treat a wrongful repudiation of the contract by the other party as a complete renunciation of it." — BOWEN, L.J., in Mersey Steel & Iron Co. *v.* Naylor, 1882, 9 Q. B. D. 648, 671.

[2] Dutch *v.* Warren, 1721, 1 Str. 406, (money advanced to buy stock); Anon., 1721, 1 Str. 407, (money advanced to buy stock).

[3] 1786, 1 Term R. 133, 134.

justice." This suggests the probable reason for permitting an election — a feeling that the plaintiff had at least lost his money and that the return of his money was a simpler adjustment of rights than the assessment of the damages suffered by the plaintiff as a result of the refusal of the defendant to perform his contract. It is noteworthy that while the remedy of restitution was not permitted by the Roman law it was allowed by the Code Napoléon, and has recently become almost uniformly available in Germany.[1]

§ 262. (II) **Scope of the doctrine**: (1) **Limited application to cases of goods sold or services rendered.** — The doctrine has been invoked most frequently in the recovery of money paid.[2] It

[1] See Professor Williston, "Dependency of Mutual Promises in the Civil Law," 13 Harv. Law Rev. 84, 94, 95; Wald's Pollock, "Contracts" (Williston's ed.), pp. 346, 347.

[2] *Money paid for land.* Squire *v.* Todd, 1808, 1 Camp. 293; Bartlett *v.* Turchin, 1815, 6 Taunt. 259; Gosbell *v.* Archer, 1835, 4 Nev. & Man. 485; Flinn *v.* Barber, 1879, 64 Ala. 193; Worley *v.* Nethercott, 1891, 91 Cal. 512; 27 Pac. 767; 25 Am. St. Rep. 209; Richter *v.* Union Land Co., 1900, 129 Cal. 367; 62 Pac. 39, (money paid for water rights); Carter *v.* Fox, 1909, 11 Cal. App. 67; 103 Pac. 910; Wrayton *v.* Naylor, 1894, 24 Can. S. C. 295; Thresher *v.* Stonington Bank, 1896, 68 Conn. 201; 36 Alt. 38; Payne *v.* Pomeroy, 1892, 21 D. C. 243; Hurd *v.* Denny, 1855, 16 Ill. 492; Trinkle *v.* Reeves, 1861, 25 Ill. 214; 76 Am. Dec. 793; Smith *v.* Treat, 1908, 234 Ill. 552; 85 N. E. 289; Dantzeiser *v.* Cook, 1872, 40 Ind. 65; Wilhelm *v.* Fimple, 1870, 31 Ia. 131; 7 Am. Rep. 117; Kimball *v.* Bell, 1892, 47 Kan. 757; 28 Pac. 1015; Doherty *v.* Dolan, 1876, 65 Me. 87; 20 Am. Rep. 677; Ballou *v.* Billings, 1884, 136 Mass. 307; Weaver *v.* Aitcheson, 1887, 65 Mich. 285; 32 N. W. 436; Morrison *v.* Ives, 1845, 4 Smed. & M. (12 Miss.) 652; Langford *v.* Caldwell, 1871, 48 Mo. 508; Dakota, etc., Co. *v.* Price, 1887, 22 Neb. 96; 34 N. W. 97; Reddington *v.* Henry, 1869, 48 N. H. 273; Weaver *v.* Bently, 1803, 1 Caines (N. Y.) 47; Freer *v.* Denton, 1875, 61 N. Y. 492; Lewis *v.* Brinkley, 1858, 50 N. C. 295; Kicks *v.* State Bank, 1904, 12 N. D. 576; 98 N. W. 408; Stickter *v.* Guldin, 1858, 30 Pa. St. 114; Wood *v.* Mason, 1865, 42 Tenn. (2 Cold.) 251; House *v.* Kendall, 1881, 55 Tex. 40; Newberry *v.* Ruffin, 1903, 102 Va. 73; 45 S. E. 733; Riverside Residence Co. *v.* Husted, 1909, 109 Va. 688; 64 S. E. 958; Tallensen *v.* Gunderson, 1853, 1 Wis. 113.

Money paid for goods. Towers *v.* Barrett, 1786, 1 Term R. 133; Giles *v.* Edwards, 1797, 7 T. R. 181; Biggerstaff *v.* Rowatt's Wharf, [1896] 2 Ch. 93; Nash *v.* Towne, 1866, 5 Wall. (U. S.) 689; Campbell Co. *v.* Marsh, 1894, 20 Col. 22; 36 Pac. 799; Barr *v.* Logan, 1848,

has also been applied, however, to cases of goods sold[1] or services rendered;[2] but with this important limitation — that

5 Harr. (Del.) 52; Winn *v.* Morris, 1894, 94 Ga. 452; 20 S. E. 339; Miner *v.* Bradley, 1839, 22 Pick. (Mass.) 457; Phares *v.* Jaynes, 1906, 118 Mo. App. 546; 94 S. W. 585; Danforth *v.* Dewey, 1824, 3 N. H. 79; Meader *v.* Cornell, 58 N. L. J. 375; 33 Atl. 960; Raymond *v.* Bearnard, 1815, 12 Johns. (N. Y.) 274; 7 Am. Dec. 317; Bier *v.* Bash, 1905, 107 App. Div. 429; 95 N. Y. Supp. 281, (*aff.* 1906, 186 N. Y. 565; 79 N. E. 1101); Smethurst *v.* Woolston, 1842, 5 Watts & Serg. (Pa.) 106. And see cases of rescission for breach of warranty, Williston, "Sales," § 608.

Money paid for insurance. Black *v.* Supr. Council, Amer. Legion of Honor, 1903, 120 Fed. 580, (C. C. Ind.), *aff.* 123 Fed. 650; 59 C. C. A. 414; Van Werden *v.* Equitable Life Assur. Co., 1896, 99 Ia. 621; 68 N. W. 892; McKee *v.* Phœnix Ins. Co., 1859, 28 Mo. 383; 75 Am. Dec. 129; American Life Ins. Co. *v.* McAden, 1885, 109 Pa. St. 399; 1 Atl. 256. *Contra:* Phœnix Mut. Life Ins. Co. *v.* Baker, 1877, 25 Ill. 410; Continental Life Ins. Co. *v.* Hauser, 1887, 111 Ind. 266; 12 N. E. 479. See *post*, § 265.

[1] Bartholomew *v.* Markwick, 1864, 15 C. B. N. S. 711; Ankeny *v.* Clark, 1893, 148 U. S. 345; 13 S. Ct. 617; United States *v.* Molloy, 1904, 127 Fed. 953; 62 C. C. A. 585; Johnson Forge Co. *v.* Leonard, 1902, 3 Penn. (Del.) 342; 51 Atl. 305; 57 L. R. A. 225; 94 Am. St. Rep. 86; Hess Co. *v.* Dawson, 1894, 149 Ill. 138; 36 N. E. 557; Smith *v.* Keith & Perry Coal Co., 1889, 36 Mo. App. 567; Thompson *v.* Gaffey, 1897, 52 Neb. 317; 72 N. W. 314; Brown *v.* Mahurin, 1859, 39 N. H. 156; Kokomo Strawboard Co. *v.* Inman, 1892, 134 N. Y. 92; 31 N. E. 248; Wellston Coal Co. *v.* Franklin Paper Co., 1897, 57 Ohio St. 182; 48 N. E. 888; Tucker *v.* Billing, 1881, 3 Utah 82; 5 Pac. 554.

[2] Mayor *v.* Pyne, 1825, 3 Bing. 285; Planché *v.* Colburn, 1831, 8 Bing. 14; Prickett *v.* Badger, 1856, 1 C. B. N. S. 295; Clay *v.* Yates, 1856, 1 Hurl. & Nor. 73; Chicago *v.* Tilley, 1880, 103 U. S. 146; Fowler *v.* Armour, 1854, 24 Ala. 194; Webster *v.* Enfield, 1848, 5 Gilm. (10 Ill.) 298; County of Jackson *v.* Hall, 1870, 53 Ill. 440; Anglo-Wyoming Oil Fields *v.* Miller, 1905, 117 Ill. App. 552; *aff.* 216 Ill. 272; 74 N. E. 821; Hoagland *v.* Moore, 1828, 2 Blackf. (Ind.) 167; Ottoway *v.* Milroy, 1909, 144 Ia. 631; 123 N. W. 467; Jenson *v.* Lee, 1903, 67 Kan. 539; 73 Pac. 72; Wright *v.* Haskell, 1858, 45 Me. 489; North *v.* Mallory, 1902, 94 Md. 305; 51 Atl. 89; Brown *v.* Woodbury, 1903, 183 Mass. 279; 67 N. E. 327; Hemminger *v.* Western Assur. Co., 1893, 95 Mich. 355; 54 N. W. 949; Siebert *v.* Leonard, 1871, 17 Minn. 433; McCullough *v.* Baker, 1871, 47 Mo. 401; Moore *v.* Board of Regents, 1908, 215 Mo. 705; 115 S. W. 6; Cook & Woldson *v.* Gallatin R. Co., 1903, 28 Mont. 509; 73 Pac. 131; Thompson *v.* Gaffey, 1897, 52 Neb. 317; 72 N. W. 314; Stephen *v.* Camden & Phila. Soap Co., 1907, 75 N. J. L. 648; 68 Atl. 69; Person

where the injured party has fully performed before the repudiation or breach occurs, the right to restitution is not recognized.[1] If such full performance entitles the injured party, under the contract, to a liquidated sum of money, *i.e.* raises a debt, he may, it is true, sue in indebitatus assumpsit,[2] but the measure of his recovery is what the defendant promised to pay him, not what the goods or services are reasonably worth.[3]

v. Stoll, 1902, 72 App. Div. 141; 76 N. Y. Supp. 324; *aff.* 174 N. Y. 548; 67 N. E. 1089; Derby *v.* Johnson, 1848, 21 Vt. 17; Preble *v.* Bottom, 1855, 27 Vt. 249.

[1] Anderson *v.* Rice, 1852, 20 Ala. 239; Campbell *v.* Dist. of Col., 1876, 2 MacAr. (D. C.) 533; Reams *v.* Wilson, 1908, 147 N. C. 304; 60 S. E. 1124; Shropshire *v.* Adams, 1905, 40 Tex. Civ. App. 339; 89 S. W. 448.

[2] Stone *v.* Rodgers, 1837, 2 Mees. & Wels. 443; Bank of Columbia *v.* Patterson, 1813, 7 Cranch (U. S.) 299; Dermott *v.* Jones, 1864, 2 Wall. (U. S.) 1; Hunter *v.* Waldron, 1845, 7 Ala. 753; Massey *v.* Greenabaum Bros., 1904, 5 Penn. (Del.) 20; 58 Atl. 804; Shepard *v.* Mills, 1898, 173 Ill. 223; 50 N. E. 709; Peterson *v.* Pusey, 1908, 237 Ill. 204; 86 N. E. 692; Shilling *v.* Templeton, 1879, 66 Ind. 585; Rogers *v.* Brown, 1908, 103 Me. 478; 70 Atl. 206; Southern Bldg., etc., Asso. *v.* Price, 1898, 88 Md. 155; 41 Atl. 53; 42 L. R. A. 206; Nicol *v.* Fitch, 1897, 115 Mich. 15; 72 N. W. 988; 69 Am. St. Rep. 542; Morin *v.* Robarge, 1903, 132 Mich. 337; 93 N. W. 886; New Orleans, etc., R. Co. *v.* Pressley, 1871, 3 Morris (45 Miss.) 66; Barnett *v.* Sweringen, 1898, 77 Mo. App. 64; Hosley *v.* Black, 1863, 28 N. Y. 438. And see Keener, "Quasi-Contracts," p. 301; Wald's Pollock, "Contracts" (Williston's ed.), p. 337.

If, however, the seller of goods agrees to take the buyer's bill or note, payable at a future day, he cannot bring indebitatus assumpsit upon the buyer's failure to give the bill or note, but must wait until the period of credit expires. Mussen *v.* Price, 1803, 4 East 147; Dutton *v.* Solomonson, 1803, 3 Bos. & Pul. 582; Manton *v.* Gammon, 1880, 7 Ill. App. 201; Hall *v.* Hunter, 1854, 4 G. Greene (Ia.) 539; Carson *v.* Allen, 1838, 6 Dana (36 Ky.) 395; Hanna *v.* Mills, 1839, 21 Wend. (N. Y.) 90; 34 Am. Dec. 216; Yale *v.* Coddington, 1839, 21 Wend. (N. Y.) 175. And see Maas *v.* Montgomery Iron Wks., 1889, 88 Ala. 323; 6 So. 701. But see, *contra*, Stocksdale *v.* Schuyler, 1890, 55 Hun 610; 29 N. Y. St. Rep. 380; 8 N. Y. Supp. 813, *aff.* 130 N. Y. 674; 29 N. E. 1034; Tyson *v.* Doe, 1843, 15 Vt. 571; Foster *v.* Adams, 1888, 60 Vt. 392; 15 Atl. 169; 6 Am. St. Rep. 120. If the buyer agrees to give the bill or note of a third person and fails so to do, indebitatus assumpsit may be brought at once. See Hall *v.* Hunter, 1854, 4 G. Greene (Ia.) 539.

[3] Dermott *v.* Jones, 1864, 2 Wall. (U. S.) 1; Pusey & Jones Co. *v.* Dodge, 1900, 3 Penn. (Del.) 63; 49 Atl. 248; Campbell *v.* Dist. of Col.,

There seems to be no valid reason for this limitation. Possibly the fact that the assessment of compensatory damages is likely to be less difficult where the breach occurs after the defendant has received full performance accounts for it in some degree. But certainly it is quite as easy to assess compensatory damages where the plaintiff's full performance consists of the payment of money as where it consists of the delivery of goods or the rendition of services; yet in the former case the remedy of restitution is allowed. In criticism of the limitation, Professor Keener says:[1]

"While it is true that the plaintiff should, if he so desire, be allowed to sue in debt or in *indebitatus assumpsit*, simply to recover the contract price, treating the performance on his side as creating a debt, still it would seem that logically he should be allowed to claim restitution in value in such cases as much as in the case where he seeks and is allowed to recover not the money, which he in fact paid the defendant, but an equivalent sum of money. When the plaintiff paid the money he did not expect its return, but its equivalent; and the promised performance by the defendant, which subsequent events have shown to be less in value than the parties supposed, was treated by the parties as the equivalent of the plaintiff's money; and yet the plaintiff is allowed, regardless of this fact, to recover from the defendant the full amount paid. But if a defendant in default is not allowed to return a sum less than the amount received by him where he has received money from the plaintiff, why should he be allowed to return less than the actual value of the services or property received by him under a contract which he has not performed?"[2]

Another illogical limitation that has been widely accepted is that if, by the terms of the contract, the injured party, in return for his goods or services, is to receive, not money, but goods or

1876, 2 MacAr. (D. C.) 533; Barnett *v.* Sweringen, 1898, 77 Mo. App. 64. Keener, "Quasi-Contracts," p. 301; Wald's Pollock, "Contracts," (Williston's ed.) p. 337. And see other cases in preceding note.

[1] "Quasi-Contracts," pp. 301, 302.

[2] And see Wald's Pollock, "Contracts" (Williston's ed.), pp. 336, 337.

services, he may not elect to sue for restitution but must rely upon his action for damages.[1] This indicates a misconception of the theory of the action for restitution. Fortunately there is authority to the contrary,[2] and moreover, it seems that the limitation is not applicable to cases in which goods or services are contracted for at a certain money price which the buyer has the option to pay in goods or services.[3]

In the case of land conveyed, there seems to be no alternative remedy at law, but in some cases restitution *in specie* may be enforced in equity.[4]

[1] Harrison *v.* Luke, 1845, 14 Mees. & W. 139; (*cf.* Keys *v.* Harwood, 2 C. B. 905); Anderson *v.* Rice, 1852, 20 Ala. 239; Bernard *v.* Dickens, 1860, 22 Ark. 351; Cockran *v.* Tatum, 1826, 3 T. B. Mon. (19 Ky.) 404; Slayton *v.* McDonald, 1881, 73 Me. 50; Pierson *v.* Spaulding, 1886, 61 Mich. 90; 27 N. W. 865; Mitchell *v.* Gile, 1841, 12 N. H. 390; Brooks *v.* Scott, 1811, 2 Munf. (Va.) 344; Bradley *v.* Levy, 1856, 5 Wis. 400.

[2] Stone *v.* Nichols, 1880, 43 Mich. 16; 4 N. W. 545; Brown *v.* St. Paul, etc., R. Co., 1886, 36 Minn. 236; 31 N. W. 941; Clark *v.* Fairchild, 1840, 22 Wend. (N. Y.) 576.

[3] Sullivan *v.* Boley, 1888, 24 Fla. 501; 5 So. 244; Newman *v.* McGregor, 1832, 5 Ohio 349; 24 Am. Dec. 293; Wainwright *v.* Straw, 1843, 15 Vt. 215; 40 Am. Dec. 675; Perry *v.* Smith, 1850, 22 Vt. 301; Butcher *v.* Carlile, 1855, 12 Gratt. (Va.) 520. But see Pierson *v.* Spaulding, 1886, 61 Mich. 90; 27 N. W. 865; Bradley *v.* Levy, 1856, 5 Wis. 400.

[4] Savannah, etc., R. Co. *v.* Atkinson, 1894, 94 Ga. 780; 21 S. E. 1010, (bill for cancellation of conveyance on abandonment of work by railway); McClelland *v.* McClelland, 1898, 176 Ill. 83; 51 N. E. 559, (bill to set aside a deed on breach of agreement to support); Clark *v.* McCleery, 1901, 115 Ia. 3; 87 N. W. 696, (grantor intervened in foreclosure proceedings begun by grantee on breach of latter's agreement to exchange land); Shepardson *v.* Stevens, 1889, 77 Mich. 256; 43 N. W. 918, (bill to set aside a deed on breach of agreement to support); Pironi *v.* Corrigan, 1890, 47 N. J. Eq. 135; 20 Atl. 218, (bill to set aside a deed on breach of agreement to procure a separation between grantor and her husband); Michel *v.* Halheimer, 1890, 56 Hun 416; 10 N. Y. Supp. 489, (counterclaim for a reconveyance because of grantee's breach of agreement to improve property to joint profit); Wilfong *v.* Johnson, 1895, 41 W. Va. 283; 23 S. E. 730, (bill to set aside deed on grantee's failure to bind himself and the land by a contract in writing to support grantor's and grantee's father, as he had orally agreed to do); Glocke *v.* Glocke, 1902, 113 Wis. 303; 89 N. W. 118; 57 L. R. A. 458, (action to enforce rescission of contract for breach of condition subsequent; agreement was for support, secured by mortgage, equity

§ 263. (2) **Application to cases of repudiation and to cases of substantial breach.** — It appears to be settled, both in England and America, that the *repudiation* of a contract, though unaccompanied by actual breach, justifies a demand for restitution:

Hochster v. *De la Tour*, 1853, 2 Ell. & Bl. 678: CROMPTON, J. (p. 685): "When a party announces his intention not to fulfil the contract, the other side may take him at his word and rescind the contract."

Ballou v. *Billings*, 1884, 136 Mass. 307: HOLMES, J. (p. 308): "Such a repudiation did more than excuse the plaintiff from completing a tender; it authorized him to treat the contract as rescinded and at an end. It had this effect, even if, for want of a tender, the time for performance on the defendant's part had not come, and therefore it did not amount to a breach of covenant. . . . It is clear that, apart from technical considerations, so far as the right to rescind goes, notice that a party will not perform his contract has the same effect as a breach."

Drake v. *Goree*, 1853, 22 Ala. 409: GOLDTHWAITE, J. (p. 415): "if, while the contract was executory, the defendants in error did any act which showed clearly they did not intend to perform their portion of the contract, it would have justified the other party in terminating it."

By repudiation is meant a refusal to perform,[1] or an act rendering performance impossible,[2] though an admis-

reading into the conveyance a condition subsequent and treating the action as one to quiet title).

[1] Johnstone *v.* Milling, 1886, 16 Q. B. D. 460; Dingley *v.* Oler, 1886, 117 U. S. 490; 6 S. Ct. 850; Johnson Forge Co. *v.* Leonard, 1902, 3 Penn. (Del.) 342; 51 Atl. 305; 57 L. R. A. 225; 94 Am. St. Rep. 86; Harber Bros. Co. *v.* Moffat Cycle Co., 1894, 151 Ill. 84; 37 N. E. 676; O'Neill *v.* Supreme Council, 1904, 70 N. J. L. 410; 57 Atl. 463; Peters Grocery Co. *v.* Collins Bag Co., 1906, 142 N. C. 174; 55 S. E. 90; Maffet *v.* Oregon, etc., R. Co., 1905, 46 Or. 443; 80 Pac. 489. For a collection of authorities see South Texas Telephone Co. *v.* Huntington, 1909, Tex. Civ. App. ; 121 S. W. 242, 247–9. And see Harriman, "Contracts," § 521.

[2] Short *v.* Stone, 1846, 8 Q. B. 358, (contract to marry; defendant married another); Seibel *v.* Purchase, 1904, 134 Fed. 484, (C. C. D. N. J.), (contract to convey free from incumbrance; renewal of mortgage

sion of "entire inability to perform" has been held sufficient.[1]

In England it is the law, apparently, that nothing short of repudiation will serve:

Ehrensperger v. *Anderson*, 1848, 3 Exch. 148: Action for money had and received. Held, that the failure of the defendant to remit a bill of exchange did not justify rescission of the contract and an action for restitution. PARKE, B. (p. 158): "In order to constitute a title to recover for money had and received, the contract on the one side must not only not be performed or neglected to be performed, but there must have been something equivalent to saying 'I rescind this contract,' — a total refusal to perform it, or something equivalent to that which would enable the plaintiff on his side to say, 'If you rescind the contract on your part, I will rescind it on mine.'" [2]

There are not a few expressions to the same effect — for the most part *dicta* — in American cases:

Graves v. *White*, 1882, 87 N. Y. 463: FINCH, J. (p. 465): "The doctrine of these authorities is, that the refusal of one party to perform his contract amounts on his part to an abandonment of it. The other party thereupon has a choice of remedies. He may stand upon his contract, refusing assent to his adversary's attempt to rescind it, and sue for a breach, or in a proper case, for a specific performance, or he may assent to its abandonment, and so effect a dissolution of the contract by the mutual and concurring assent of both parties. . . . While, therefore, a mere neglect to perform might sometimes amount

by vendor); Woodberry *v.* Warner, 1890, 53 Ark. 488; 14 S. W. 671, (contract to transfer interest in boat; sale of same by defendant); Smith *v.* Treat, 1908, 234 Ill. 552; 85 N. E. 289, (contract to convey; sale to stranger); James *v.* Burchell, 1880, 82 N. Y. 108, (conveyance to another); Kicks *v.* State Bank, 1904, 12 N. D. 576; 98 N. W. 408, (contract to convey; sale to another); Krebs Hop Co. *v.* Livesley, 1907, 51 Or. 527; 92 Pac. 1084, (contract for sale of hops to be grown; sale of land to another). And see Harriman, "Contracts," § 521.

[1] Chamber of Commerce *v.* Sollitt, 1866, 43 Ill. 519. See also Tague *v.* McColm, 1909, 145 Ia. 179; 123 N. W. 960.

[2] See also Freeth *v.* Burr, 1874, L. R. 9 C. P. 208, 214; *In re* Phœnix, etc., Co., 1876, 4 Ch. Div. 108; Mersey Steel & Iron Co. *v.* Naylor, 1884, 9 App. Cas. 434, 438; Cornwall *v.* Heuson, [1900] 2 Ch. 298; Rhymney R. Co. *v.* Brecon, etc., R. Co., 1900, 83 L. T. Rep. 111.

to a breach, and fall short of an election to abandon, which the assent of the other party might make effective, a positive and absolute refusal, a deliberate repudiation of the stipulations of the contract, gives to the other party as an alternative remedy the right to assent to such abandonment and treat the contract as dissolved." [1]

This limitation, as the foregoing quotations show, rests upon two notions: first, that rescission is a matter of mutual consent; second, that unless the party in default actually abandons the contract, his consent to a rescission cannot be implied. It is submitted that the first is false, in that rescission, as the term is here used, is not a matter of mutual consent, any more than is the avoidance of a contract for fraud, but is the act of one party in the exercise of a right conferred upon him by law. The underlying theory is that if one fails in a serious degree to perform his engagement, the other party may disregard the contract and demand restitution (see *ante*, § 260). It is true that repudiation may evince an immoral purpose not indicated by an unavoidable or even a negligent breach, however substantial; but in its consequences to the other party an unavoidable breach may be quite as serious as a willful abandonment. The second is likewise false, because even in the case of abandonment or repudiation it is not a fair inference that the party in default consents to abrogate the contract and make restitution to the other party. There may be an *express* agreement of rescission, either in the case of repudiation or in the case of breach, but to say that an agreement to rescind is *implied* is to resort to a fiction — and one which would serve in the case of substantial breach quite as well as in that of repudiation.[2]

[1] See also Monarch Cycle Co. *v.* Royer Wheel Co., 1900, 105 Fed. 324; 44 C. C. A. 523; McAllister-Coman Co. *v.* Matthews, 1910, 167 Ala. 361; 52 So. 416; 140 Am. St. Rep. 43; Quarton *v.* Amer. Law Book Co., 1909, 143 Ia. 517; 121 N. W. 1009; 32 L. R. A. (N. S.) 1; Wright *v.* Haskell, 1858, 45 Me. 489; West *v.* Bechtel, 1900, 125 Mich. 144; 84 N. W. 69; 51 L. R. A. 791; Blackburn *v.* Reilly, 1885, 47 N. J. L. 290; 54 Am. Rep. 159. Professor Keener accepted the limitation without question. "Quasi-Contracts," pp. 303, 304.

[2] See Bannister *v.* Reed, 1844, 1 Gilman (6 Ill.) 92.

There is no sound reason, then, for allowing the remedy of restitution in one case and denying it in the other. As a matter of fact, restitution is generally enforced in America where there has been such a *substantial breach* as would constitute a defense to an action by the party in default to enforce the contract:

Porter v. *Arrowhead Co.*, 1893, 100 Cal. 500; 35 Pac. 146: GAROUTTE, J. (p. 504): "A failure to pay an installment of the contract price, as provided in the contract, is a substantial breach of the contract, and gives the contractor the right to consider the contract at an end, cease work, and recover the value of the work already performed." [1]

§ 264. (3) **Application to cases of contracts under seal.** — There is some authority for the proposition that in the case of the renunciation or breach of a contract under seal the injured party may not elect to sue in assumpsit for restitution, but is confined to his remedy in debt or covenant.[2] Two reasons may be offered for this view: (1) the doctrine that one must pursue his highest remedy, and (2) the doctrine that a contract under seal can be dissolved only by an act of like dignity. The first doctrine, it is submitted, is not properly applicable to this case if the contract is regarded as dissolved by the "rescission." For if there is no longer a promise, the only remedy of the plaintiff is an action for restitution.[3] But if the right to restitution is

[1] Also: United States *v.* Molloy, 1904, 127 Fed. 953; 62 C. C. A. 585; Carter *v.* Fox, 1909, 11 Cal. App. 67; 103 Pac. 910; Carney *v.* Newberry, 1860, 24 Ill. 203; Wolf *v.* Schlacks, 1896, 67 Ill. App. 117; Anderson *v.* Haskell, 1876, 45 Ia. 45; N. Y. Brokerage Co. *v.* Wharton, 1909, 143 Ia. 61; 119 N. W. 969; Festing *v.* Hunt, 1890, 6 Manitoba 381; Brown *v.* Woodbury, 1903, 183 Mass. 279; 67 N. E. 327; Stahelin *v.* Sowle, 1891, 87 Mich. 124; 49 N. W. 529; Peet *v.* City of East Grand Forks, 1907, 101 Minn. 518; 112 N. W. 1003; Mugan *v.* Regan & Co., 1892, 48 Mo. App. 461; Welsh *v.* Gossler, 1882, 89 N. Y. 540; Preble *v.* Bottom, 1855, 27 Vt. 249. For additional cases, see Wald's Pollock, "Contracts" (Williston's ed.), p. 342, n.

[2] Western *v.* Sharp, 1853, 14 B. Mon. (53 Ky.) 144; McManus *v.* Cassidy, 1870, 66 Pa. St. 260. But see Amer. Life Ins. Co. *v.* McAden, 1885, 109 Pa. St. 399; 1 Atl. 256.

[3] Keener, "Quasi-Contracts," pp. 308, 309.

merely an alternative remedial right under the contract, as suggested at the beginning of this chapter, the doctrine would seem to present a real obstacle to the use of the remedy in the case of a contract under seal. The second doctrine, though thoroughly established in the early common law, is in this country disappearing. In many jurisdictions the seal has been entirely divested of its legal attributes; in others, while still recognized by the law, it has so suffered in prestige that a sealed contract may be varied or discharged by parol agreement.[1] It is "going very little further" to hold that a sealed contract may be rescinded for repudiation or substantial breach:

Weaver v. *Bentley*, 1803, 1 Caines (N. Y.) 47: KENT, J. (p. 48): "It is not stated for what the notes, money or stock were given; presuming them to have been the consideration of the covenant, the question then will be, whether the defendant having failed to perform on his part, the plaintiff may disaffirm the contract and resort to his *assumpsit* to recover back what he had paid. We are of the opinion that he had his election either to proceed on the covenant, and recover damages for the breach, or to disaffirm the contract, and bring *assumpsit* to recover back what he had paid on a consideration which had failed.

Ballou v. *Billings*, 1884, 136 Mass. 307: HOLMES, J., after referring to the Massachusetts cases holding that a sealed contract might be discharged by parol agreement (p. 309); "Whether these cases would have been decided the same way in earlier times or not, we have no disposition to question them upon this point, and it is going very little further to hold that such a contract may be rescinded if it is repudiated by the other side."[2]

Professor Keener says that the cases indicate that while money paid in performance of a contract under seal may be recovered

[1] Wald's Pollock, "Contracts" (Williston's ed.), pp. 826, 827, and cases cited.

[2] Also: Webster *v.* Enfield, 1848, 5 Gilman (10 Ill.) 298; Amer. Life Ins. Co. *v.* McAden, 1885, 109 Pa. St. 399; 1 Atl. 256. And see Siebert *v.* Leonard, 1871, 17 Minn. 433.

in a count for money had and received, the sole remedy of one who has delivered property or rendered services under such a contract is an action on the covenant.[1] Professor Williston, however, has pointed out that while this distinction may be suggested by the English cases, it finds no support in America.[2] In *Weaver* v. *Bentley*,[3] where the plaintiff had given notes, money, and farm stock, a recovery appears to have been allowed for the property as well as for the money, and in none of the other cases, whether allowing a recovery or not, does the court evince a consciousness of the distinction.

§ 265. (III) **Restitution by plaintiff as condition precedent.** — The right to restitution is said to be subject to the condition that the party seeking to exercise it shall first restore or offer to restore anything that he may have received under the contract.[4]

[1] Keener, "Quasi-Contracts," p. 308.

[2] Wald's Pollock, "Contracts" (Williston's ed.), p. 344, n.

[3] 1803, 1 Caines (N. Y.) 47.

[4] Miner *v.* Bradley, 1839, 22 Pick. (Mass.) 457. Action to recover money paid for a quantity of hay. Plaintiff bought of defendant a cow and 400 pounds of hay for $17, which was paid at the time. The cow was delivered, but the defendant refused to deliver the hay. MORTON, J.: "When the defendant refused to deliver the hay, it was such a violation of the contract on his part, as would have justified the plaintiff in rescinding it. And, had he done so, he would have been entitled to a return of the money which he had paid. This, however, he could only do by restoring the defendant to the situation he was in before the contract, viz. by returning the cow. But if he chose to retain her, his only remedy would be upon the special contract for damages for the convertion of the hay." See also Kauffman *v.* Raeder, 1901, 108 Fed. 171; 47 C. C. A. 278; 54 L. R. A. 247, (sale of stock); Los Angeles Traction Co. *v.* Wilshire, 1902, 135 Cal. 654; 67 Pac. 1086; Mizell *v.* Watson, 1909, 57 Fla. 111; 49 So. 149, (horse and buggy); Summerall *v.* Graham, 1879, 62 Ga. 729, (possession of land); County of Jackson *v.* Hall, 1870, 53 Ill. 440, (repudiated bonds); Modern Woodmen *v.* Vincent, 1907, 40 Ind. App. 711; 82 N. E. 475, (insurance premiums); Moore *v.* Bare, 1860, 11 Ia. 198, (patent right); Clover *v.* Gottlieb, 1898, 50 La. Ann. 568; 23 So. 459, (horses given as part payment for land); Poché *v.* New Orleans Co., 1900, 52 La. Ann. 1287; 27 So. 797, (purchase price); Clark *v.* Baker, 1843, 5 Metc. (Mass.) 452, (part of cargo of corn); Snow *v.* Alley, 1887, 144 Mass. 546; 11 N. E. 764; 59 Am. Rep. 119, (money loaned); Gullich *v.* Alford, 1883, 61 Miss. 224, (profits of partnership); Doughten *v.* Camden Assn., 1886, 41 N. J. Eq. 556; 7 Atl. 479, (mortgage and assignment of

Where, however, it is money that has been received, the rule is frequently not enforced, the plaintiff being permitted to recover the value of his own performance less the amount received by him.[1]

What if the *res* received by the plaintiff has been lost or disposed of, or if it is something of a nature that cannot be returned *in specie*, as services, or the protection of insurance, or the use of property? By the weight of authority, except in the case of insurance contracts, restitution is not, under such circumstances, an available remedy:

De Montague v. *Bacharach*, 1902, 181 Mass. 256; 63 N. E. 435: Action to recover money paid for privilege of running a restaurant in part of a basement of which the defendants were lessees. LORING, J. (p. 260): "The second ground on which the plaintiff seeks to keep his verdict is that on the breach of the contract by the defendants, he was entitled to rescind the contract and recover from the defendants what he paid under it. . . . In the case at bar, the plaintiff had enjoyed the privilege of conducting the restaurant for at least ten months; for that reason he could not put the defendants *in statu quo* and therefore could not rescind the contract on the defendants committing a breach of it." [2]

shares); Gale *v.* Nixon, 1826, 6 Cow. (N. Y.) 445, (possession of land); Brown *v.* Witter, 1840, 10 Ohio 142, (possession of land); Fay *v.* Oliver, 1848, 20 Vt. 118; 49 Am. Dec. 764, (possession of land); Phelps *v.* Mineral Spring Heights Co., 1904, 123 Wis. 253; 101 N. W. 364, (land contract). "The offer to return the property must be continuous and kept good." — J. B. Alfree Mfg. Co. *v.* Grape, 1900, 59 Neb. 777, 782; 82 N. W. 11, 13.

[1] Cook *v.* Gray, 1882, 133 Mass. 106; Connolly *v.* Sullivan, 1899, 173 Mass. 1; 53 N. E. 143; Siebert *v.* Leonard, 1871, 17 Minn.433; McCullough *v.* Baker, 1871, 47 Mo. 401; Smith *v.* Keith & Perry Coal Co., 1889, 36 Mo. App. 567; Moore *v.* Board of Regents, 1908, 215 Mo. 705; 115 S. W. 6; Clark *v.* Manchester, 1872, 51 N. H. 594; Wellston Coal Co. *v.* Franklin Paper Co., 1897, 57 Ohio St. 182; 48 N. E. 888.

[2] Also: Kauffman *v.* Raeder, 1901, 108 Fed. 171; 47 C. C. A. 278; 54 L. R. A. 247; Snow *v.* Alley, 1887, 144 Mass. 546; 11 N. E. 764; 59 Am. Rep. 119, (aid to corporation in which plaintiff was interested); Gullich *v.* Alford, 1883, 61 Miss. 224, (profits of partnership); Fay *v.* Oliver, 1848, 20 Vt. 118; 49 Am. Dec. 764, (use of land). In life

But there are a few cases to the contrary. Thus, in the Massachusetts case of *Brown* v. *Woodbury*,[1] decided only one year later than *De Montague* v. *Bacharach*,[2] where the plaintiff, pursuant to the terms of a contract of employment, had received the benefit of the board of his father and mother for several months, the court said: "Part payment in money would not bar the plaintiff from the action on *quantum meruit*, and in principle part payment in board can have no different effect." And in the Georgia case of *Timmerman* v. *Stanley*,[3] where the plaintiff

insurance cases, by the apparent weight of authority, the insured may enforce restitution of the premiums paid, notwithstanding the fact that he has enjoyed the protection of the insurance contract up to the time of its repudiation or breach by the company, and without deducting the value of such protection. Black *v.* Supr. Council, Amer. Legion of Honor, 1903, 120 Fed. 580, (C. C. Ind.); *aff.* 123 Fed. 650; 59 C. C. A. 414; Van Werden *v.* Equitable Life Assur. Co., 1896, 99 Ia. 62; 68 N. W. 892; American Life Ins. Co. *v.* McAden, 1885, 109 Pa. St. 399; 1 Atl. 256. *Contra:* Phœnix Mut. Life Ins. Co. *v.* Baker, 1877, 85 Ill. 410; Continental Life Ins. Co. *v.* Hauser, 1887, 111. Ind. 266; 12 N. E. 479. The position of the courts which allow a recovery in these insurance cases may be explained, in part at least, by the fact that contracts of insurance are peculiar in that the protection enjoyed by the assured is not something which might have been sold to another if the insured had not bought it, and further in that the only value with which the company has irrevocably parted is the expense of issuing the policy and of doing the necessary bookkeeping on the insured's account. See Day *v.* Conn. Gen. Life Ins. Co., 1878, 45 Conn. 480; 29 Am. Rep. 693, in which it was said that the insured might recover "the equitable and just value of the policy."

[1] 1903, 183 Mass. 279, 282; 67 N. E. 327.

[2] 1902, 181 Mass. 256; 63 N. E. 435.

[3] 1905, 123 Ga. 850, 854; 51 S. E. 760; 1 L. R. A. (N. S.) 379. In this case the court said: "This is a general rule where one party to the contract has received goods, money, or other thing of value, which is capable of being returned to the other party. But in a contract like that involved in the present case, where a person agrees to teach another a certain thing, to qualify him for a certain position, if he gives the student some instruction and then refuses to complete his contract, there would be no possible way by which such instruction as he had given could be returned or tendered back to him; nor is the other party required to estimate value for what has been done and tender such amount. He cannot hold on to the amount paid, refuse to proceed with the contract, and defend against an action to recover the price paid on the ground that the plaintiff had not tendered back to him his instruction, and could not restore him to the *status quo*."

had purchased two scholarships in a business college and had been wrongfully expelled before completion of the courses to which he was entitled, it was held that a recovery was not barred by the fact that the plaintiff, by reason of having received some instruction, could not place the defendant *in statu quo*.[1]

In England this rule that the defendant must be placed *in statu quo* has been so rigidly applied that one who has received the benefit of part performance is rarely in a position to demand restitution. Thus, though he returns property received by him, he will not be permitted to enforce restitution because he has also enjoyed a benefit which cannot be returned *in specie* — the temporary use of the property:

Hunt v. *Silk*, 1804, 5 East 449: Action to recover money paid under a contract for a lease. The plaintiff took immediate possession, but upon the defendant's failure to make repairs within ten days, as agreed, quit the house. Lord ELLENBOROUGH, C.J. (p. 452): "Now where a contract is to be rescinded at all, it must be rescinded *in toto* and the parties put *in statu quo*. But here was an intermediate occupation, a part execution of the agreement, which was incapable of being rescinded. If the plaintiff might occupy the premises two days beyond the time when the repairs were to have been done and the lease executed, and yet rescind the contract, why might he not rescind it after a twelvemonth on the same account? This objection cannot be gotten rid of: the parties cannot be put *in statu quo*." [2]

The American courts, in general, have assumed a more liberal attitude, and not infrequently have ignored the incidental benefit derived by the plaintiff from the temporary use or possession of property received under the contract:

Campbell Mfg. Co. v. *Marsh*, 1894, 20 Colo. 22; 36 Pac. 799: Action to recover money paid under a contract for the purchase of a

[1] See also Ottoway *v.* Milroy, 1909, 144 Ia. 631; 123 N. W. 467, (services of child in return for clothing, education, etc.; defendant was allowed credit for value of benefit actually conferred).

[2] Also: Street *v.* Blay, 1831, 2 Barn. & Ad. 456; Blackburn *v.* Smith, 1848, 2 Ex. 783; Beed *v.* Blandford, 1828, 2 Younge & J. 278.

printing press and a folding machine from the defendant. The press was delivered to the plaintiff and used for a period of about seven weeks, when the contract was rescinded for the non-delivery of the folder. HAYT, C.J. (p. 31): "It is urged that as the press had been put in use by the appellees the appellant could not be placed *in statu quo* and hence the former could not rescind. It is undoubtedly true that where one of the parties to a contract seeks to rescind, he must place the other *in statu quo*. He will not be allowed to repudiate a contract and retain a benefit derived therefrom. In this case, however, it was in contemplation of the parties that the press should be used pending the delivery of the folder. The evidence shows that, in fact, it was used only to a very limited extent; that appellees had little or no benefit from such use, and that the press was returned in as good condition as when received. It is true that the witness testified that it would not sell so well as an unused press, but the rule requiring the seller to be placed *in statu quo* has never, we think, been extended so far as to entitle the party in default to be saved from all loss." [1]

[1] See also Nothe *v.* Nomer, 1887, 54 Conn. 326; 8 Atl. 134, (plf. had been in possession of real property for three months); Benson *v.* Cowell, 1879, 52 Ia. 137; 2 N. W. 1035, (plf. had had use of $570 for five months); Reynolds *v.* Lynch, 1906, 98 Minn. 58; 107 N. W. 145, (value of option for 90 days). This liberality was carried very far in Ankeny *v.* Clark, 1893, 148 U. S. 345; 13 S. Ct. 617, where the plaintiff was allowed to rescind a contract and recover the value of wheat delivered thereunder, although he had enjoyed the possession of land which the defendant had contracted to convey to him for over four years, which possession was admitted to be worth more than $2000. See also Wright *v.* Haskell, 1858, 45 Me. 489. *Cf.* Aultman & Taylor Co. *v.* Mead, 1901, 109 Ky. 583; 60 S. W. 294, where it was held that one who has used a sawmill for 3 years cannot rescind, since such use "would very probably reduce its salable value."

There are a number of cases which, while holding that rescission cannot be made without a return of property received by the plaintiff, apparently assume that upon such restitution by the plaintiff he may rescind. In these cases nothing is said of the impossibility of placing the parties *in statu quo* because of the plaintiff's use or possession of the property. See Summerall *v.* Graham, 1879, 62 Ga. 729; Moore *v.* Bare, 1860, 11 Ia. 198; Clover *v.* Gottlieb, 1898, 50 La. Ann. 568; 23 So. 459; Miner *v.* Bradley, 1839, 22 Pick. (Mass.) 457; Clark *v.* Baker, 1843, 5 Metc. (Mass.) 452; Boeker *v.* Crescent Belting, etc., Co., 1903, 101 Mo. App. 429; 74 S. W. 385; Gale *v.* Nixon, 1826, 6 Cow. (N. Y.) 445; Brown *v.* Witter, 1840, 10 Ohio 142.

The many American cases allowing rescission for breach of warranty exemplify this attitude,[1] while those denying the right of rescission for breach of warranty rest in the main, not upon the ground that the parties cannot be restored to their original positions because of the plaintiff's temporary enjoyment of the property, but upon the ground that a warranty is a collateral contract.

In a few instances the courts have declared that where the plaintiff has enjoyed the use of property, he should recover, upon its restoration, the value of the benefit conferred upon the defendant less the value of the use of the property.[2] This is a just and reasonable solution of the problem. Indeed, even where no part of that which the plaintiff has received can be restored *in specie* — as in the case of goods which have been disposed of, or of services rendered the plaintiff — it would seem reasonable to permit him to recover the value of the benefit conferred upon the defendant subject to a deduction for what has been received from the defendant. It has been suggested that it is impossible, under such circumstances, to "apportion the consideration" — by which, apparently, is meant that it is impossible to determine the difference in value between the performance of the defendant and that of the plaintiff; but, as Professor Keener has shown, the problem would be no more difficult than that which confronts a jury in many cases of breach of contract.[3]

§ 266. (IV) **What constitutes an election.** — As in other cases of alternative remedies, there is some difficulty in determining what constitutes such an election of one remedy as precludes a

[1] Williston, "Sales," §§ 608, 610, and cases there cited.

[2] Wilson *v.* Burks, 1883, 71 Ga. 862; Todd *v.* Leach, 1897, 100 Ga. 227; 28 S. E. 43; Todd *v.* McLaughlin, 1900, 125 Mich. 268; 84 N. W. 146; Brewster *v.* Wooster, 1892, 131 N. Y. 473; 30 N. E. 489; Weitzel *v.* Leyson, 1909, 23 S. D. 367; 121 N. W. 868; Mason *v.* Lawing, 1882, 10 Lea (78 Tenn.) 264. In Kicks *v.* State Bank, 1904, 12 N. D. 576; 98 N. W. 408, where the purchaser of land rescinded because of the vendor's breach, it was held that the value of the purchaser's possession was offset by the interest on the money paid to the vendor.

[3] Keener, "Quasi-Contracts," p. 306.

resort to the other.[1] The prosecution of one remedy to judgment must be conclusive, since all rights of the injured party are merged in the judgment.[2] The commencement of an action to enforce one remedy, by the weight of authority, is decisive.[3] Ordinarily inaction has no significance, but the retention, for an unreasonable time, of money or property received under the contract,[4] or the failure, in the case of a contract requiring more than one act by the other party, to give reasonable notice that further performance will not be accepted,[5] may properly be regarded as evincing an election not to seek restitution.

§ 267. (V) **The necessity of notice or demand: Statute of limitations.** — It is frequently stated that reasonably prompt notice of rescission is a prerequisite to the action for restitution, or that the election of restitution must be manifested without undue delay.[6] An examination of the cases, however, will show

[1] See *post*, § 298; also 15 Cyc. 259 *et seq.*

[2] Goodman *v.* Pocock, 1850, 15 Q. B. 576; Graham *v.* Halloway, 1867, 44 Ill. 385. And see Bacon *v.* Moody, 1903, 117 Ga. 207; 43 S. E. 482; Weill *v.* Fontanel, 1889, 31 Ill. App. 615; also cases cited in 15 Cyc. 259.

[3] Brown *v.* St. Paul, etc., R. Co., 1886, 36 Minn. 236; 31 N. W. 941; Lawrence *v.* Taylor, 1843, 5 Hill (N. Y.) 107, 114, 115; Graves *v.* White, 1882, 87 N. Y. 463. And see Theusen *v.* Bryan, 1901, 113 Ia. 496; 85 N. W. 802; Holman *v.* Updike, 1911, 208 Mass. 466, 94 N. E. 689; Moller *v.* Tuska, 1881, 87 N. Y. 166; Conrow *v.* Little, 1889, 115 N. Y. 387; 22 N. E. 346; 5 L. R. A. 693; also cases cited in 15 Cyc. 259, 260.

[4] Reynolds *v.* Nelson, 1821, 6 Mad. 18; Mizell *v.* Watson, 1909, 57 Fla. 111; 49 So. 149; Harden *v.* Lang, 1900, 110 Ga. 392; 36 S. E. 100; Sanford *v.* Emory's Admr., 1864, 34 Ill. 468; Axtel *v.* Chase, 1881, 77 Ind. 74; J. B. Alfree Mfg. Co. *v.* Grape, 1900, 59 Neb. 777; 82 N. W. 11. And see Graham *v.* Hatch Storage Battery Co., 1904, 186 Mass. 226; 71 N. E. 532, where it was held that the use of goods after notice of rescission is an "abandonment of the right of rejection."

[5] Mills *v.* City of Osawatomie, 1898, 59 Kan. 463; 53 Pac. 470; Lawrence *v.* Dale, 1817, 3 Johns. Ch. (N. Y.) 23.

[6] See Hennessy *v.* Bacon, 1890, 137 U. S. 78; 11 S. Ct. 17; Mizell *v.* Watson, 1909, 57 Fla. 111; 49 So. 149; Carney *v.* Newberry, 1860, 24 Ill. 203; Axtel *v.* Chase, 1881, 77 Ind. 74; Mullin *v.* Bloomer, 1860, 11 Ia. 360; Olson *v.* Brison, 1906, 129 Ia. 604; 106 N. W. 14; Mills *v.* City of Osawatomie, 1898, 59 Kan. 463; 53 Pac. 470; Gaty *v.* Sack, 1885, 19 Mo. App. 470; World Pub. Co. *v.* Hull, 1899, 81 Mo. App. 277; J. B. Alfree Mfg. Co. *v.* Grape, 1900, 59 Neb. 777; 82 N. W. 11; Swazey *v.* Choate Mfg. Co., 1868, 48 N. H. 200.

that in most of them, either the plaintiff had received something from the defendant under the contract, or the contract was of such a nature that unless promptly informed the defendant would naturally proceed with his performance. Under such circumstances, as is pointed out in the preceding section, inaction may well be interpreted as an election not to seek restitution. Hence the statement that unless notice is promptly given restitution will not be enforced.[1] Upon the theory that restitution and compensation are alternative remedial rights arising upon the repudiation or material breach of a contract, there is no reason for making notice, as such, a prerequisite to the election of either.[2]

In Texas the peculiar doctrine is announced, in cases of the sale of real property, that no notice is necessary where the vendee has abandoned the contract or has so acted as to give the vendor the reasonable belief that he has abandoned it, or where the vendee has not commenced performance; but that where the vendee has partly performed his engagement, as by "paying a portion of the purchase money, or taking possession and making improvements," and then has committed a material breach, he is entitled to reasonable notice of the vendor's intention to rescind. "The reason of this rule," it is said, "is obvious. He

[1] Notice of election of restitution should not be confused with the notice that is sometimes necessary in order to make a default substantial. Where time is not of the essence of the contract, as in the case of the sale of land, or where no time is fixed by the contract, the injured party cannot establish such a breach as will justify an action for restitution unless, by notice, he fixes a reasonable time within which the other party is required to perform. Green *v.* Sevin, 1879, 13 Ch. Div. 589; McFadden *v.* Henderson, 1901, 128 Ala. 221; 29 So. 640; Walters *v.* Miller, 1860, 10 Ia. 427; Higby *v.* Whittaker, 1837, 8 Ohio 198; Kirby *v.* Harrison, 1853, 2 Ohio St. 326; 59 Am. Dec. 677. And see note, 50 Am. Dec. 678. But, obviously, this is not notice of rescission.

[2] See Ripley *v.* Hazelton, 1870, 3 Daly (N. Y. Ct. of Common Pleas) 329, where VAN BRUNT, J., said (p. 330): "The necessity of notice upon the rescission of a contract exists only, as I understand the law, when the party rescinding has received some benefit or advantage from the contract, which he must surrender before he can claim to rescind. He must put the other party in the same position he occupied before entering into the contract."

[the vendee] may be able to give a reasonable excuse for his failure to fully perform; that would entitle him, in equity, to protection to the extent he had performed." [1]

Whether notice is required or not, it seems clear that an action for restitution need not be preceded by a demand.[2] The right arises upon the repudiation or breach, and is barred by the statute of limitations at the same time as is the right to compensation in damages.[3]

§ 268. (VI) **Measure of recovery.** — The theory of the remedy being that the parties should be placed substantially *in statu quo*, the measure of recovery is the value of the plaintiff's performance. In case the plaintiff is allowed to recover without first returning money received by him from the defendant (*ante*, § 265), the amount so received must, of course, be deducted. By the weight of authority, while the price or rate of compensation fixed by the contract is evidence of value,[4] the plaintiff is not restricted to such price or rate but may recover whatever he proves the performance to have been actually worth:

[1] Kennedy *v.* Embry, 1888, 72 Tex. 387, 390; 10 S. W. 88; Phillips *v.* Herndon, 1890, 78 Tex. 378; 14 S. W. 857; 22 Am. St. Rep. 59.

[2] Thresher *v.* Stonington Bank, 1896, 68 Conn. 201; 36 Atl. 38; Trinkle *v.* Reeves, 1861, 25 Ill. 214; 76 Am. Dec. 793; Fay *v.* Fitzpatrick, 1905, 130 Ia. 279; 105 N. W. 398; Raymond *v.* Bearnard, 1815, 12 Johns. (N. Y.) 274; 7 Am. Dec. 317.

[3] Finch *v.* Parker, 1872, 49 N. Y. 1.

[4] Reynolds *v.* Jourdan, 1856, 6 Cal. 108; Monarch *v.* Board of Comrs., 1897, 49 La. Ann. 991; 22 So. 259; Rodemer *v.* Hazelhurst, 1850, 9 Gill (Md.) 288; Fitzgerald *v.* Allen, 1880, 128 Mass. 232; Siebert *v.* Leonard, 1871, 17 Minn. 433; In Siebert *v.* Leonard, *supra*, the court said: "And as the plaintiff has the right to insist that he shall not lose anything by the fault of the defendants in thus preventing the performance of the contract, he has the right to claim that he shall receive as much for such materials and services as he would have received for the same if he had gone on and completed the special contract." This goes too far. If the plaintiff wishes compensation for his loss, he should not rescind the contract, but should bring an action for damages. If he rescinds, he is entitled only to the fair value of his performance and has no right "to insist that he shall not lose anything by the fault of the defendants."

Fitzgerald v. Allen, 1880, 128 Mass. 232: LORD, J. (p. 234): "The result of the cases is, that, if the special contract is terminated by any means other than the voluntary refusal of the plaintiff to perform the same upon his part, and the defendant has actually received benefit from the labor performed and materials furnished by the plaintiff, the value of such labor and materials may be recovered upon a count upon a *quantuum meruit*, in which case the actual benefit which the defendant receives from the plaintiff is to be paid for, independently of the terms of the contract. The contract itself is at an end. Its stipulations are as if they had not existed. But this does not imply that the contract may not be put in evidence, and its terms referred to, upon the question of the real value to the defendant of the plaintiff's labor and materials." [1]

In some jurisdictions, however, a failure to realize the nature of the remedy has led to the illogical rule that the recovery must be limited in every case by the contract price or rate.[2] That is to say, whatever may be the actual value of the plaintiff's performance, he should not be permitted to recover more than he had agreed to take and the defendant had agreed to pay for such performance:

[1] *Accord:* Valente *v.* Weinberg, 1907, 80 Conn. 134; 67 Atl. 369; 13 L. R. A. (N. S.) 448; Rodemer *v.* Hazelhurst, 1850, 9 Gill (Md.) 288; Fitzgerald *v.* Allen, 1880, 128 Mass. 232; Bailey *v.* Marden, 1906, 193 Mass. 277; 79 N. E. 257; Kearney *v.* Doyle, 1871, 22 Mich. 294; Hemminger *v.* Western Assurance Co., 1893, 95 Mich. 355; 54 N. W. 949; (but see Eakright *v.* Torrent, 1895, 105 Mich. 294; 63 N. W. 293); McCullough *v.* Baker, 1871, 47 Mo. 401; Smith *v.* Keith & Perry Coal Co., 1889, 36 Mo. App. 567; Clark *v.* Manchester, 1872, 51 N. H. 594; Clark *v.* New York, 1850, 4 N. Y. 338; 53 Am. Dec. 379; Wellston Coal Co. *v.* Franklin Paper Co., 1897, 57 Ohio St. 182; 48 N. E. 888; Philadelphia *v.* Tripple, 1911, 230 Pa. St. 480; 79 Atl. 703; Derby *v.* Johnson, 1848, 21 Vt. 17; Chamberlin *v.* Scott, 1860, 33 Vt. 80. And see United States *v.* Behan, 1883, 110 U. S. 338, 345; 4 S. Ct. 81; Clover *v.* Gottlieb, 1898, 50 La. Ann. 568; 23 So. 459.

[2] Dobbins *v.* Higgins, 1875, 78 Ill. 440; Chicago *v.* Sexton, 1885, 115 Ill. 230; 2 N. E. 263; Rice *v.* Partello, 1899, 88 Ill. App. 52; Western *v.* Sharp, 1853, 14 B. Mon. (53 Ky.) 144; Doolittle *v.* McCullough, 1861, 12 Ohio St. 360, (but see Wellston Coal Co *v.* Franklin Paper Co., 1897, 57 Oh. St. 182; 48 N. E. 888); Noyes *v.* Pugin, 1891, 2 Wash. 653; 27 Pac. 548.

Doolittle v. *McCullough*, 1861, 12 Ohio St. 360: The plaintiff had contracted with the defendants to make certain excavations on a section of railroad bed at eleven cents per cubic yard. The plaintiff did the least expensive part of the work and received payment therefor according to the contract price, but before the plaintiff completed performance the defendant repudiated the contract and employed others to do the work. Thereupon the plaintiff rescinded and sought to recover twenty cents per cubic yard for the work done, claiming that to be its real value. SUTLIFF, J. (p. 366): "But when the special contract is proved, whether by the plaintiff, or defendant, under which the services were rendered; the special, and not the implied contract must determine the rights and liabilities of the parties arising in regard to the services. The price having been determined and mutually agreed upon by them, neither of the parties can vary the price so fixed by the contract. Nor, as to the price of the services actually rendered under the contract, while in force between the parties, can it avail the plaintiff, bringing his action to recover therefor, that since the rendering the services, the defendant has put an end to the special contract. The fact would still remain, that the services were rendered under a special contract, and at the price agreed upon, and expressed by the parties." [1]

[1] In the later Ohio case of Wellston Coal Co. *v.* Franklin Paper Co., 1897, 57 Ohio St. 182; 48 N. E. 888, the court said, with reference to Doolittle *v.* McCullough (p. 186): "The rule there stated may be regarded as a proper one in a case where, as in that case, it appears from the claim of the plaintiff, that the breach of the contract by the defendant worked no loss, but a benefit to him, on the ground, as appears, that had he been required to complete the work, he would have suffered a much greater loss; for, if the least expensive part of the work could not have been done without loss, it follows that the doing of the remaining part, under the contract, would have resulted in a still greater loss. The action upon a *quantum meruit* is of equitable origin, and is still governed by considerations of natural justice. Hence, when one has performed labor or furnished material under a contract that is wrongfully terminated by the other party before completion, the question arises whether the party not in fault should be confined to the contract for what he did, or to a *quantum meruit;* and this must depend upon whether the act of the other party in terminating the contract, works a loss or not to him, regard being had to the contract. If it works no loss, but is in fact a benefit, as in the case of *Doolittle* v. *McCullough*, there are no considerations of justice requiring that he

Where the defendant's breach appears to have been unavoidable, there is, perhaps, no serious objection to this limitation, except that it disregards the fact that a contract rate is fixed in anticipation of full performance, and consequently cannot fairly be regarded as the rate agreed upon for part performance. This is strikingly exemplified in the case of *Wellston Coal Co.* v. *Franklin Paper Co.*,[1] where it appeared that, under a contract by which the plaintiff agreed to furnish coal for a year at a flat rate per ton, the defendant received the coal during that part of the year when the market was above the contract price, but broke the contract when the dull season arrived and the market fell below the contract price. Even if the breach in that case had been unavoidable it would have been unjust to limit the plain-

should be compensated in a greater sum for what he did than is stipulated in the contract. These considerations exercised a controlling influence in the case just referred to. The plaintiff had a contract with the defendant for the making of certain excavations in the construction of a railroad. He was to receive for the entire work eleven cents per cubic yard. He had performed the least expensive part of the work when the contract was wrongfully terminated by the defendant, and on this part, by his own showing, he had suffered a loss. The proof showed that the performance of the remainder, being hardpan, would have cost him a great deal more. It was then evident, as the court observed, that he had sustained no loss but a benefit, from the termination of the contract by the defendant. But in the case before us the facts are very different. They are in fact just the reverse. The contract was for the delivery of coal at a price generally received during the dullest season of the whole year. The defendant received the coal during the season when the market was above the contract price. He had the benefit of the difference between the market and the contract price; but when the dull season arrived, and the advantages of the contract would accrue to the plaintiff, the defendant repudiated it. The difference between the two cases is thus apparent. In the case before us, justice and fair dealing require that the defendant having repudiated the contract, should pay the market price for the coal at the time it was delivered; in the former case, as the repudiation of the contract by the defendant did not enrich him to the loss of the plaintiff, there were no considerations of justice on which the plaintiff could claim more than the contract price for what he had done under the contract."

This restriction of the rule to cases where it appears that the defendant's breach or repudiation actually saved the plaintiff from loss reduces it almost to innocuity.

[1] 1897, 57 Ohio St. 182; 48 N. E. 888.

tiff's recovery to the contract price of the coal delivered. Where the defendant has negligently failed or willfully refused to do what he contracted to do, or has intentionally interfered with the plaintiff's performance, he should certainly be compelled to pay the full value of what he has received, even though it exceeds the contract price. As the court said in *Derby* v. *Johnson:*[1] "We think the defendants have no right to say that the contract which they have thus repudiated, shall still subsist for the purpose of defeating a recovery by the plaintiffs of the actual amount of labor and materials they have expended."

§ 269. **Same: Effect of settlement or payment pro tanto.** — There are cases which hold that if, before rescission, the plaintiff was paid in full for a distinct part of his performance or there was a settlement of the amount due for a distinct part of his performance, such payment or settlement is conclusive and he cannot show that the performance was actually of greater value:

Rodemer v. *Hazelhurst*, 1850, 9 Gill (Md.) 288: The plaintiff contracted to grade a section of railroad for the defendants. Monthly estimates were to be made of the quantity and value of the work done during the month, four fifths of which value was to be paid to the plaintiff immediately, and the balance on completion of the work, said estimates to be conclusive between the parties. Estimates and payments were made for several months, and then, the defendants repudiating the contract, the plaintiff brought this action for the value of the work done. FRICK, J. (p. 294): "Are these adjustments obligatory upon him, or is the contract open in its entirety to claim, as he does here, the fair and full value of his work, independent of the prices regulated by the contract? . . . He is concluded by these settlements, and by reason of their being closed as distinct and separate portions of the contract, he cannot open them again to prove and recover the actual value of his work. His claim has in fact been liquidated upon the quantity of work done and the value ascertained by the prices in the contract,

[1] 1848, 21 Vt. 17, 22.

and he is effectually barred by adopting the adjustment and receiving payments under them." [1]

This rule is doubtless a sound one when applied to an agreement which is severable in the sense that it really constitutes two or more separate contracts. But the propriety of its application to cases like *Rodemer* v. *Hazelhurst* [2] and *Doolittle* v. *McCullough* [3] is at least questionable. Payments *pro tanto* in such cases are not received in extinguishment of the defendant's liability; or, at most, the extinguishment is subject to the condition that the contractor be allowed to complete the job and receive compensation, at the contract rate, for the whole of it. This is very clearly pointed out in a New Hampshire case:

Clark v. *Manchester*, 1872, 51 N. H. 594: The plaintiff, who had contracted to work as a laborer for the defendants for a year at $25 per month or $300 for the year, and who had drawn his salary for several months, was discharged without cause. It appeared that he had worked during those months when he could have earned $30 or $35 per month, whereas for the balance of the year he might not be able to earn more than $15 or $20 per month. SARGENT, J. (p. 595): "If he had continued the

[1] *Accord:* Farnum *v.* Kennebec Water Dist., 1909, 170 Fed. 173; 95 C. C. A. 355, (contract to lay water pipe); Doolittle *v.* McCullough, 1861, 12 Ohio St. 360, (contract to grade railroad). And see Chicago *v.* Sexton, 1885, 115 Ill. 230; 2 N. E. 263, (building contract).

Professor Keener adopts this rule ("Quasi-Contracts," p. 312): "If, however, under the terms of the contract, the plaintiff was to be paid for the work as it progressed, and has in fact been paid therefor, the fact of the defendants subsequently refusing to allow the plaintiff to further perform cannot change the fact that he has been paid for the part done according to the terms of the contract. If he has suffered a loss in consequence of the defendant putting an end to the contract at the time he did, whereas, in fact, he would have made a profit had the defendant permitted him to perform the contract, he has established a right to recover damages in an action for breach of contract, for refusing to allow him to fully perform the contract. But the fact is not changed that he has received in extinguishment of the defendant's liability that which it was agreed before the work was begun should be paid by the defendant."

See also Sutherland, "Damages" (2d ed.), § 713.

[2] 1850, 9 Gill (Md.) 288.

[3] 1861, 12 Ohio St. 360.

year out, and had gone every month and received his $25, that would have completed the contract on both sides, and that sum, by the month for the whole year, would have been payment in full for his services; yet, when the defendants rescind the contract in the midst of the term, without sufficient cause, they cannot claim that the payments which have been made, though at the rate per month stipulated for the whole time, shall be received in full for the services rendered, if those services were worth more for that time than the average for the year.

"The contract is to be construed as a whole. It is not $25 per month for a single month, or for each separate month, or for any number of months less than the year. The contract being entire, the defendants cannot break one part of it and still insist upon the performance of the other part. When the defendants rescinded the contract, they put it out of their power to enforce it upon the other party, but the other party may consider it as rescinded and claim pay just as though it had never existed, which will be just what he is claiming here, namely, to recover what his services were worth for the time he labored.

"The error of the defendants' counsel in their brief is in assuming that here was payment made by the defendants and received by the plaintiff in full for the services of each month. The defendants cannot hold the plaintiff to the agreed price per month only in connection with the other part of the contract, viz. that the employment should continue at the same rate for the whole year."

CHAPTER XX

ACTION FOR RESTITUTION AS ALTERNATIVE REMEDY FOR TORT

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§ 297. (X) Effect of satisfaction by one of two tort-feasors.
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§ 270. **In general: Is the obligation quasi contractual?** — Upon the commission of a tort an obligation always rests upon

the tort-feasor to compensate the person injured for the damage suffered by him. The commission of a tort, however, frequently results not only in damage to the person injured but in a benefit to the tort-feasor. In the case of conversion by the wrongful sale of another's goods, for example, the owner suffers damage to the extent of the value of the goods and the converter is benefited to the extent of the sum realized by the sale. Wherever there is such an enrichment of the wrongdoer he is clearly under a moral obligation (aside from the obligation to pay damages) to make restitution, either *in specie* or in value. Although the injured party already had an adequate remedy at law, it is not surprising that the courts came to regard this moral obligation to make restitution as analogous to a debt, and by the familiar device of a fictitious promise, brought it within the reach of the simple and convenient remedy of indebitatus assumpsit.

Is this obligation of the tort-feasor, enforceable in assumpsit, a primary obligation which results from the violation of another primary obligation, *i.e.* the obligation not to commit a tort? Or is it, like the obligation to pay damages, a secondary obligation arising upon the commission of a tort? As a matter of legal theory, it seems more reasonable to say that in these cases, as in those in which restitution is allowed as a remedy for the repudiation or substantial breach of a contract (*ante*, § 260), there is only one primary obligation, and that upon the violation of such primary obligation the person injured may elect to demand damages or restitution. If this is the true view, the topic of the present chapter belongs to the law of torts or of damages. But, as a matter of fact, the obligation to make restitution has been regarded generally as a primary one; and since, if it is primary, it obviously must be quasi contractual, a consideration of the subject in this book will not be out of place.

§ 271. (I) **Essential elements of the obligation**: (1) **The commission of a tort.** — The phrase "waiver of tort," commonly used to denote the election of assumpsit, is unfortunate. It implies that the *wrong* is waived, which is both inaccurate and misleading. To speak of a suit in equity for the specific performance of a contract as a waiver of the breach would hardly be

more objectionable. As is pointed out in the preceding section there is in reality an election between alternative obligations resulting from the commission of a tort — an obligation to pay such damages as the plaintiff has suffered, and an obligation to pay for such benefits as the defendant has received. Whichever obligation is chosen to be enforced, there can be no recovery without proof of the commission of a tort.

§ 272. (2) **The receipt of a benefit by the tort-feasor.** — It is fundamental that assumpsit cannot be maintained against a tort-feasor unless it appears that he has reaped a benefit from his wrongful act.[1] In the consideration of this element of the obligation, two questions must be answered: first, must the benefit consist of *money* received by the tort-feasor? second, must the benefit consist of something *taken from the party injured?*

§ 273. **Same: Must benefit consist of money received?** — In the cases in which the fiction of a promise by the tort-feasor was first indulged, the benefit sought to be recovered in assumpsit consisted of money realized from the sale of the plaintiff's goods.[2] It has been contended that the doctrine, properly conceived, has no wider application; or at least that the only form of assumpsit maintainable against the tort-feasor is that of money had and received to the plaintiff's use.[3] This view

[1] Minor *v.* Baldridge, 1898, 123 Cal. 187; 55 Pac. 783; Patterson *v.* Prior, 1862, 18 Ind. 440; 81 Am. Dec. 367; Fanson *v.* Linsley, 1878, 20 Kan. 235; National Trust Co. *v.* Gleason, 1879, 77 N. Y. 400; 33 Am. Rep. 632.

[2] See Lamine *v.* Dorrell, 1705, 2 Ld. Raym. 1216; Hitchin *v.* Campbell, 1772, 2 Wm. Bl. 827; Hambly *v.* Trott, 1776, Cowp. 371; Longchamp *v.* Kenny, 1779, 1 Doug. 137.

[3] Pike *v.* Bright, 1856, 29 Ala. 332; Bowman *v.* Browning, 1856, 17 Ark. 599; Woodruff *v.* D. Zaban & Son, 1909, 133 Ga. 24; 65 S. E. 123; 134 Am. St. Rep. 186; Rogers *v.* Greenbush, 1869, 57 Me. 441; 4 Am. Rep. 292; Quimby *v.* Lowell, 1897, 89 Me. 547; 36 Atl. 902; Jones *v.* Hoar, 1827, 5 Pick. (Mass.) 285; Watson *v.* Stever, 1872, 25 Mich. 386; Sandeen *v.* Kansas City, etc., R. Co., 1883, 79 Mo. 278; Carson River Lumbering Co. *v.* Bassett, 1866, 2 Nev. 249; Smith *v.* Smith, 1862, 43 N. H. 536; Willet *v.* Willet, 1834, 3 Watts (Pa.) 277; Boyer *v.* Bullard, 1883, 102 Pa. St. 555; Stearns *v.* Dillingham, 1850, 22 Vt. 624; Kidder *v.* Sowles, 1872, 44 Vt. 303. And see 15 Am. & Eng. Ency. of Law (2d ed.) 1116; 4 Cyc. 334, n. 68.

is taken in the frequently quoted Massachusetts case of *Jones* v. *Hoar*,[1] in which Chief Justice PARKER said:

"The whole extent of the doctrine, as gathered from the books, seems to be, that one whose goods have been taken from him or detained unlawfully, whereby he has a right to an action of trespass or trover, may, if the wrongdoer sell the goods and receive the money, waive the tort, affirm the sale, and have an action for money had and received for the proceeds."

In the majority of cases, as in *Jones* v. *Hoar*, no serious attempt to justify this limitation of the doctrine is made. Of the arguments that have been advanced in its favor, the opinion in *Sandeen* v. *Kansas City, St. Joseph & Council Bluffs Railroad Company*,[2] affords a fair example. Said MARTIN, C., speaking for the court in that case:

"This extension of the doctrine [to cases where converted goods have not been sold by the tort-feasor] would tend to do away with the action of tort, for perhaps in a majority of the wrongs inflicted the wrongdoer receives some benefit. It is generally with the expectation of some benefit that he incurs the liability of guilt. The inherent weakness of the doctrine consists in the arbitrary substitution of a promise, which cannot be found in anything which the party to be charged has said or done. Nothing could be further from his intention than an actual promise. It is the extreme of fiction to impose the deliberation, solemnity, and obligation of a sale upon the actual facts of a highway robbery."

Undoubtedly it is, as the learned court said, the extreme of fiction. But it is likewise the extreme of fiction to declare that the money realized by a highway robber from the sale of his booty is received by him " to the use " of his victim. For that matter the whole law of quasi contract, from the *remedial* point of view, depends upon the fiction that the defendant has promised to do that which in justice he ought to do.

[1] 1827, 5 Pick. (Mass.) 285, 290.
[2] 1883, 79 Mo. 278, 282.

That the doctrine of election extends to all cases in which the tort results in the enrichment of the wrongdoer, whether the benefit received by him consists of money or of something else, would seem to be the broader and truer view.[1] And perhaps its strongest and clearest expression is found in the North Dakota case of *Braithwaite* v. *Aiken*,[2] in which CORLISS, J., said:

"But we are of the opinion that this limitation of the doctrine that the tort may be waived is without foundation in reason or principle. The whole doctrine is built upon a fiction. It asserts that what was done in defiance of the owner's rights was in law done with the most perfect regard for his rights; that the wrongdoer has received the money for the owner, or that he has bought the property from the owner at its fair value. This fiction is indulged only in the interests of the owner, and it rests upon the receipt by the wrongdoer of benefits accruing to him from his wrongful acts. Where no benefits are received, the liability is only for the wrong. As this right in the injured party to turn the tort liability into a contract liability stands upon the receipt of benefits by the wrongdoer, is it not beneath the dignity of any tribunal to draw a distinction between the receipt of benefits in the shape of cash and the receipt of benefits in the form of property? In our judgment the fact that a sale has not been made is unimportant."

§ 274. **Same: Must benefit consist of something taken from injured party?** — Perhaps it was arguable at one time that the obligation of a tort-feasor in assumpsit is analogous to that of a

[1] Roberts *v.* Evans, 1872, 43 Cal. 380; Toledo, etc., R. Co. *v.* Chew, 1873, 67 Ill. 378; Fanson *v.* Linsley, 1878, 20 Kan. 235; Aldine Mfg. Co. *v.* Barnard, 1891, 84 Mich. 632; 48 N. W. 280, (but *cf.* Tuttle *v.* Campbell, 1889, 74 Mich. 652, 662; 42 N. W. 384; 16 Am. St. Rep. 652; Brown *v.* Foster, 1904, 137 Mich. 35; 100 N. W. 167); Downs *v.* Finnegan, 1894, 58 Minn. 112; 59 N. W. 981; 49 Am. St. Rep. 488; Crane *v.* Murray, 1904, 106 Mo. App. 697; 80 S. W. 280; Hirsch *v.* Leatherbee Lbr. Co., 1903, 69 N. J. L. 509; 55 Atl. 645; Terry *v.* Munger, 1890, 121 N. Y. 161; 24 N. E. 272; 8 L. R. A. 216; 18 Am. St. Rep. 803; Braithwaite *v.* Aiken, 1893, 3 N. D. 365; 56 N. W. 133; Norden *v.* Jones, 1873, 33 Wis. 600; 14 Am. Rep. 782. And see 15 Am. & Eng. Ency. of Law (2d ed.) 1116; 4 Cyc. 334, n. 69.

[2] 1893, 3 N. D. 365, 370; 56 N. W. 133.

constructive trustee and that he should be held accountable for any profits derived by him from his wrongful act. It seems to be now taken for granted, however, that the obligation is not to account for profits but to make restitution. It follows that it is not enough to show that the defendant has been enriched by his wrong; it must further appear that the benefit received by him has been *taken from the plaintiff*. As Professor Keener puts it, there must be "not only a plus, but a minus quantity."

§ 275. **Same: The taking of intangible things.** — Usually, if something has in reality been taken from the plaintiff, the fact is obvious. But where the tort consists of a wrongful use of another's property, and especially if it appears that the use has not been exclusive of the owner's use, or that the property would not have been used by its owner in any event, the minus quantity is less easily seen. Such a case was *Phillips* v. *Homfray*,[1] a suit in equity in which the defendants were charged, among other things, with the wrongful use of the plaintiff's underground roadway for the conveyance of coal and ironstone. One of the defendants, R. Fothergill by name, having died, it was contended that his executrix could not be held liable. The court so held, and after stating that "the true test to be applied in the present case is whether the plaintiff's claim against the deceased R. Fothergill . . . belongs to the category of actions *ex delicto*, or whether any form of action against the executors of the deceased, or the deceased man in his lifetime, can be based upon any implied contract or duty," said:

"The deceased, R. Fothergill, by carrying his coal and ironstone in secret over the Plaintiffs' roads took nothing from the Plaintiffs. The circumstances under which he used the road appear to us to negative the idea that he meant to pay for it. Nor have the assets of the deceased Defendant been necessarily swollen by what he has done. He saved his estate expense, but he did not bring into it any additional property or value belonging to another person."

[1] 1883, 24 Ch. D. 439, 460, 462.

But did not Fothergill take something of value from the plaintiff? The plaintiff, as owner of the road, was entitled to its uninterrupted and exclusive use. This "exclusive use" was something that belonged to him; it was something that he might dispose of, or actively exercise, or passively contemplate as his own. And every time that Fothergill used the road, whether such use interfered with the plaintiff's active employment of it or not, he temporarily deprived the plaintiff of his "exclusive use" just as truly as a converter of goods deprives the owner of his possession. It follows that to the extent of the value of Fothergill's use he was under an obligation to make restitution.

Another case in which the court appears to have been misled by the intangible character of the thing taken by the defendant is *Schillinger* v. *United States*.[1] The plaintiffs held a patent for a mode or process of constructing concrete pavement with free joints. The defendant, the United States, against the protest of the patentee, awarded a contract for the construction of such a concrete pavement to one Cook, who wrongfully used the mode or process of the plaintiffs. An action for infringement was brought against the United States in the Court of Claims, and judgment demanded for the sum alleged to have been saved by the use of the patented process. The court decided that the action sounded in tort alone; that there was no contract express or implied on the part of the government for the use of the patent; and that consequently the case was not within the jurisdiction conferred by statute upon the court. Upon appeal to the United States Supreme Court, the decision was sustained, Mr. Justice BREWER saying:[2]

"It may be that the process or mode by which Cook, the contractor, constructed the pavement in the Capitol grounds was that described in and covered by the Schillinger patent. He may, therefore, have been an infringer by using that process

[1] 1894, 155 U. S. 163; 15 S. Ct. 85. See B. F. Avery & Sons *v.* McClure, 1909, 94 Miss. 172; 47 So. 901, 902; 22 L. R. A. (N. S.) 256.

[2] At page 171.

or mode in the construction of the pavement, and liable to the claimants for the damages they have sustained in consequence thereof. It may be conceded also that the government, as having at least consented to the use by Cook of such process or method in the construction of the pavement, is also liable for damages as a joint tort-feasor. But what property of the claimants has the government appropriated? It has, and uses, the pavement as completed in the Capitol grounds, but there is no pretense of a patent to the pavement as a completed structure. When a contractor, in the execution of his contract, uses any patented tool, machine, or process, and the government accepts the work done under such contract, can it be said to have appropriated and be in possession of any property of the patentee in such a sense that the patentee may waive the tort and sue on an implied promise? The contractor may have profited by the use of the tool, machine, or process, but the work, as completed and enjoyed by the government, is the same as though done by a different and unpatented process, tool, or machine. Take for illustration, a patented hammer or trowel. If the contractor in driving nails or laying bricks use such patented tools, does any patent right pass into the building, and become a part of it, so that he who takes the building can be said to be in the possession and enjoyment of such patent right? Even if it be conceded that Cook, in the doing of this work, used tar paper, or its equivalent, to separate the blocks of concrete, and thus finally completed a concrete pavement in detached blocks or sections, was such completed pavement any different from what it would have been if the separation between the blocks had been accomplished in some other way; and is the government now in possession or enjoyment of anything embraced within the patent? Do the facts, as stated in the petition or as found by the court, show anything more than a wrong done, and can this be adjudged other than a case 'sounding in tort'?"

Whether the case sounded in tort alone, or arose upon an implied contract, depends upon the construction of the phrase "contracts, express or implied" in the statute defining the jurisdiction of the Court of Claims. But if it be assumed, as the court appears to have assumed, that the phrase includes the

obligation of a tort-feasor to make restitution, the conclusion reached by the court, it is respectfully submitted, is erroneous. The United States, it is true, did not deprive the patentee of any tangible or visible property; but it joined with the contractor in wrongfully taking from the patentee the "exclusive use" of his invention, and if the allegation of the petition as to the amount saved to the government by the use of the invention was true, the booty was not all left to the contractor.

In the New York Common Pleas case of *McSorley* v. *Faulkner*,[1] which presented the same difficulty, a more satisfactory result was reached. The plaintiff had a telephone installed in his place of business under a contract by which he agreed to pay the telephone company for its use for a stated period. Subsequently he sold his business to the defendants and left the telephone in the premises. The defendants used the telephone constantly during the remainder of the period stipulated in the contract with the company. The plaintiff paid the company for the use of the phone during the defendants' occupancy, in accordance with his contract, and in this action was allowed to recover an equivalent sum from the defendants. Assuming that the use of the telephone by the defendants constituted a tort, the decision, it is submitted, is sound. The plaintiff was entitled to the exclusive use of the instrument, and although by leaving it in the premises he may have put it out of his power actively to employ it, he nevertheless retained the ownership of the exclusive use. Consequently, every time the defendants employed the instrument they took from the plaintiff his exclusive use, and to the extent of the value of such use they were under obligation to make restitution.

§ 276. (II) **Application of doctrine to particular torts.** — Although most frequently employed as a remedy for the conversion of goods, the action of assumpsit is available in a number of other cases. For the sake of clearness, the following torts to which the doctrine applies will be separately considered:

1. Conversion.
2. Deceit.

[1] 1892, 18 N. Y. Supp. 460.

3. Trespass on land.
4. Abduction of child or servant: inducing breach of contract.
5. False imprisonment: services under compulsion.
6. Usurpation of office.
7. Infringement of patent rights.

§ 277. (1) **Conversion.** — The tort of conversion, for the purpose of this discussion, may be said to consist of either (*a*) the wrongful destruction of personal property, or (*b*) the wrongful taking, retention, use, or disposition of personal property. In cases of the first class, the wrongdoer derives no benefit from his act and the only remedy against him is an action for damages.[1] In cases of the second class, the wrongdoer is commonly enriched, and to the extent of the benefit received by him may be obliged to make restitution. This obligation is everywhere recognized, in case the converter sells the property and receives the proceeds of the sale.[2] And though, as has been pointed out (*ante*, § 273), there is authority for confining the doctrine to cases in which the count for money had and received is available, the better rule is that restitution may be demanded, instead of damages, even where the wrongdoer retains or consumes the goods.[3]

In jurisdictions where it is insisted that the count for money had and received is the only form of assumpsit that may be

[1] See Reynolds *v.* Padgett, 1894, 94 Ga. 347; 21 S. E. 570.

[2] Bettis *v.* McNider, 1903, 137 Ala. 588; 34 So. 813; 97 Am. St. Rep. 59; Jester *v.* Notts, 1904, 57 Atl. 1904, (Del.); Bates-Farley Sav. Bank *v.* Desmukes, 1899, 107 Ga. 212; 33 S. E. 175; Staat *v.* Evans, 1864, 35 Ill. 455; Leighton *v.* Preston, 1850, 9 Gill (Md.) 201; Johnson-Brinkham Co. *v.* Central Bank, 1893, 116 Mo. 558; 22 S. W. 813; 38 Am. St. Rep. 615; Seavey *v.* Dana, 1881, 61 N. H. 339; Olive *v.* Olive, 1886, 95 N. C. 485; Pryor *v.* Morgan, 1895, 170 Pa. St. 568; 33 Atl. 98. See also cases *ante*, § 273, and 4 Cyc. 332, n. 67.

[3] Roberts *v.* Evans, 1872, 43 Cal. 380; City of Elgin *v.* Joslyn, 1891, 136 Ill. 525; 26 N. E. 1090; Cooper *v.* Helsabeck, 1838, 5 Blackf. (Ind.) 14; Crane *v.* Murray, 1904, 106 Mo. App. 697; 80 S. W. 280; Harman *v.* Loscalzo, 1910, 125 N. Y. Supp. 517; Tidewater Quarry Co., *v.* Scott, 1906, 105 Va. 160; 52 S. E. 835; 115 Am. St. Rep. 864; Walker *v.* Norfolk, etc., R. Co., 1910, 67 W. Va. 273; 67 S. E. 722; Heber *v.* Estate of Heber, 1909, 139 Wis. 472; 121 N. W. 328. See also cases cited *ante*, § 273, and 4 Cyc. 334, n. 69.

employed against a tort-feasor, restitution cannot be enforced in case the goods have been disposed of by barter, instead of by sale.[1] With the obvious purpose of avoiding the limitation, however, it has been held that where the property taken by the converter in exchange for the converted goods "is received as money or as money's worth [*i.e.* at an agreed money valuation] the plaintiff may elect so to treat it and recover accordingly."[2] And in one case the court went so far as to hold that the promise of a purchaser from the converter to pay for the goods may be deemed to have been accepted by the converter as the equivalent of money.[3]

Where the conversion consists of the wrongful taking or detention of *money*, or of negotiable paper received as money, it is obvious that the count for money had and received is immediately available against the wrongdoer.[4]

§ 278. **Same: Goods obtained by fraud.** — There appears to be little difference between the position of one who has obtained goods by means of a fraudulent contract of purchase, subsequently disaffirmed by the seller, and the position of one who has taken goods by force. In both cases the wrongdoer is guilty of conversion;[5] in both cases the tort results in a benefit

[1] Fuller *v.* Duren, 1860, 36 Ala. 73; 76 Am. Dec. 318; Kidney *v.* Persons, 1868, 41 Vt. 386; 98 Am. Dec. 595; Saville *v.* Welch, 1886, 58 Vt. 683; 5 Atl. 491.

[2] Strickland *v.* Burns, 1848, 14 Ala. 511, 515; Miller *v.* Miller, 1828, 7 Pick. (Mass.) 133; 19 Am. Dec. 264. And see cases cited in preceding note.

[3] Burton Lbr. Co. *v.* Wilder, 1895, 108 Ala. 669; 18 So. 552.

[4] Neate *v.* Harding, 1851, 6 Exch. 349; First Nat. Bank *v.* Henry, 1905, 159 Ala. 367; 49 So. 97; Mason *v.* Waite, 1822, 17 Mass. 560; Tryon *v.* Baker, 1873, 7 Lans. (N. Y. Sup. Ct.) 511; Boyle *v.* Staten Island, etc., Land Co., 1897, 17 App. Div. 624; 45 N. Y. Supp. 496; *aff.* 1900, 163 N. Y. 586; 57 N. E. 1104; Hornefius *v.* Wilkinson, 1908, 51 Or. 45; 93 Pac. 474; Gould *v.* Baker, 1896, 12 Tex. Civ. App. 669, 35 S. W. 708; Elwell *v.* Martin, 1859, 32 Vt. 217; Lawson's Exr. *v.* Lawson, 1861, 16 Gratt. (Va.) 230; 80 Am. Dec. 702. *Cf.* Smith *v.* Smith, 1862, 43 N. H. 536.

[5] Farwell *v.* Hanchett, 1887, 120 Ill. 573; 11 N. E. 875; Thurston *v.* Blanchard, 1839, 22 Pick. (Mass.) 18; 33 Am. Dec. 700; Baird *v.* Howard, 1894, 51 Ohio St. 57; 36 N. E. 732; 22 L. R. A. 846; 46 Am. St. Rep. 550; Kryn *v.* Kahn, 1903, 54 Atl. 870, (N. J. Sup. Ct.).

to him (see *ante*, §§ 271, 272). Therefore, a fraudulent purchaser, in case the seller avoids the contract, should be suable in either trover or assumpsit. This is the rule in some jurisdictions.[1] Says the Kentucky Court of Appeals, in *Dietz's Assignee* v. *Sutcliffe:*[2]

"Nor do we see how it is possible to say that the plaintiffs, on repudiating the contract for fraud, had not their election between contract and tort as to the form of action. The remaining question is, what is the effect of a waiver of the tort? 'Does it restore the express contract which has been repudiated for the fraud, or does it leave the parties in the same condition as if no express contract had been made — to such relations as result by implication of law from the delivery of goods by the plaintiff and their possession by the defendant? On this subject the decisions are conflicting, but I think the weight of authority, as well as the true and logical effect of the acts of the parties, is to leave the parties to stand upon the rights and obligations resulting from the delivery and possession of the goods.'"

But there are cases to the contrary.[3] In the most conspicuous of them, *Ferguson* v. *Carrington,*[4] where it appeared that the

[1] Dietz's Assignee *v.* Sutcliffe, 1883, 80 Ky. 650; Roth *v.* Palmer, 1858, 27 Barb. (N. Y. Sup. Ct.) 652; Crown Cycle Co. *v.* Brown, 1901, 39 Or. 285; 64 Pac. 451. See Williston, "Sales," § 648.

[2] 1883, 80 Ky. 650, 654.

[3] Ferguson *v.* Carrington, 1829, 9 Barn. & Cr. 59, (*cf.* Hill *v.* Perrott, 1810, 3 Taunt. 274; Abbotts *v.* Barry, 1820, 2 Brod. & Bing. 369); Bechtel *v.* Chase, 1909, 156 Cal. 707, 711–12; 106 Pac. 81; Kellogg *v.* Turpie, 1879, 93 Ill. 265; 34 Am. Rep. 163; Allen *v.* Ford, 1837, 19 Pick. (Mass.) 217; Bedier *v.* Fuller, 1895, 106 Mich. 342; 64 N. W. 331, (The rule in Michigan was changed by statute in 1897: see Mich. Comp. Laws, § 10,421; Anderson Co. *v.* Pungs, 1903, 134 Mich. 79; 95 N. W. 985.). And see Jones *v.* Brown, 1895, 167 Pa. St. 395; 31 Atl. 647.

In Emerson *v.* Detroit, etc., Spring Co., 1894, 100 Mich. 127, 133; 58 N. W. 659, the court said: "It is suggested that, as a fraud was perpetrated upon the creditor, he would have the right to waive the tort and sue in *assumpsit.* But we are aware of no case which authorizes a party to first turn a contract into a tort, and then shift it back into the form of a new contract other than the original one."

[4] 1829, 9 Barn. & Cr. 59.

plaintiffs had been induced by the fraudulent representations of the defendant to sell him goods on credit, it was held that an action for goods sold and delivered could not be maintained until the expiration of the credit given in the contract. Lord TENTERDON, C. J., with whom all of the judges concurred, declared that:

"It was competent to the plaintiffs to have brought trover, and to have treated the contract as a nullity, and to have considered the defendant not as a purchaser of the goods, but as a person who had tortiously got possession of them; but that the plaintiffs by bringing assumpsit had affirmed that, at the time of the action brought, there was a contract existing between them and the defendant. The only contract proved, was a sale of goods on credit. The time of the credit had not expired, and consequently the action was brought too soon."

The fallacy of this argument is apparent. The bringing of an action for goods sold and delivered against a buyer does not necessarily affirm the contract of sale. The action referred to is both a contractual remedy and an alternative remedy in certain cases of tort. As has been seen (*ante*, § 277), it may be used against one who converts the plaintiff's property by force and without the semblance of a contract. And, in the case under discussion, the circumstance of the commencement of the action before the expiration of the credit stipulated for in the contract makes it obvious that the plaintiffs were not using the action as a vehicle for the enforcement of their contractual rights. They had repudiated the contract because of the buyer's fraud, and then had elected the remedy of assumpsit for goods sold and delivered, instead of the remedy of trover.

One who wishes to avoid a contract on the ground of fraud must ordinarily restore to the other party anything he may have received in performance of the contract. Consequently, one who is induced by fraudulent representations to exchange personal property cannot recover the value of the property parted with, upon the theory of "waiver of tort and suit in assumpsit," while retaining the property received by him in the exchange.[1]

[1] See Bechtel *v.* Chase, 1909, 156 Cal. 707; 106 Pac. 81.

§ 279. **Same: Goods or money received from a converter.** — One who has acquired converted goods, either with notice of the conversion or without paying value, is himself guilty of conversion, and to the extent of the benefit derived from his wrong may be called upon for restitution.[1] If he has not paid for the goods, he is ordinarily benefited to the extent of the value of the goods, or in case of a resale by him, to the extent of the price realized from such resale.[2] If he has paid for the goods, but with notice of the conversion, he is ordinarily benefited only to the extent that either the value of the goods, or the sum realized upon a resale, exceeds the amount paid by him.[3]

Even a *bona fide* purchaser for value of converted goods is liable for conversion unless, in making the purchase, he relies upon an apparent ownership or apparent authority to sell with which the seller has been clothed by the owner. Where he is liable as a tort-feasor, there is no objection to the election of assumpsit for goods sold and delivered as a means of recovering from him the value of the goods minus the price paid by him, which would ordinarily be the extent of the benefit received by him. But there are cases in which a recovery of the full value of the goods converted has been allowed.[4]

One who receives money which has been wrongfully taken

[1] Bettis *v.* McNider, 1903, 137 Ala. 588; 34 So. 813; 97 Am. St. Rep. 59; Roberts *v.* Evans, 1872, 43 Cal. 380; McArthur *v.* Murphy, 1898, 74 Minn. 53; 76 N. W. 955; Seavey *v.* Dana, 1881, 61 N. H. 339. See Berkshire Glass Co. *v.* Wolcott, 1861, 2 Allen 227; 79 Am. Dec. 781, (no recovery unless converter has sold goods and received money therefor).

[2] Bettis *v.* McNider, 1903, 137 Ala. 588; 34 So. 813, 815; 97 Am. St. Rep. 59; McArthur *v.* Murphy, 1898, 74 Minn. 53; 76 N. W. 955; Seavey *v.* Dana, 1881, 61 N. H. 339.

[3] Greer *v.* Newland, 1904, 70 Kan. 315; 78 Pac. 835; 70 L. R. A. 554; 109 Am. St. Rep. 424, (reversing 70 Kan. 310); 77 Pac. 98. But see Roberts *v.* Evans, 1872, 43 Cal. 380; Sage *v.* Shepard, etc., Lbr. Co., 1896, 4 App. Div. 290; 39 N. Y. Supp. 449, *aff.* 1899, 158 N. Y. 672; 52 N. E. 1126.

[4] Sage *v.* Shepard, etc., Lbr. Co., 1896, 4 App. Div. 290; 39 N. Y. Supp. 449, *aff.* 1899, 158 N. Y. 672; 52 N. E. 1126. And see Roberts *v.* Evans, 1872, 43 Cal. 380.

from its owner, either with notice of the wrong or without paying value, may be sued for money had and received.[1] But one who receives money innocently and for value is always protected,[2] " as it would be mischievous to require persons, who receive money in the way of business, or in payment of debts, to look into the authority of him from whom they receive it." [3]

§ 280. **Same: Goods used and returned.** — There is no doubt that the detention of another's goods, if based upon a negation of the owner's rights, is a conversion even though the goods are ultimately returned.[4] It is equally clear that whether or not the owner would have actually employed the goods, had they been in his possession, the converter has deprived him of his " exclusive use " (*ante*, § 274), and to the extent of the value of the use has enriched himself at the owner's expense. Accordingly, it is held that the owner may resort to the fiction of a

[1] Clarke *v.* Shee, 1774, Cowp. 197; Calland *v.* Lloyd, 1840, 6 Mees. *v.* Wels. 26; Heilbut *v.* Nevill, 1870, L. R. 5 C. P. 478; Bayne *v.* United States, 1876, 93 U. S. 642; Zink *v.* Wells, Fargo & Co., 1897, 72 Ill. App. 605; Mason *v.* Waite, 1822, 17 Mass. 560; City of Newburyport *v.* Spear, 1910, 204 Mass. 146; 90 N. E. 522; 134 Am. St. Rep. 652; York *v.* Farmers' Bank, 1904, 105 Mo. App. 127; 79 S. W. 968, 971; Brundred *v.* Rice, 1892, 49 Ohio St. 640; 32 N. E. 169; 34 Am. St. Rep. 589; Hindmarch *v.* Hoffman, 1889, 127 Pa. St. 284; 18 Atl. 14; 4 L. R. A. 368; 14 Am. St. Rep. 842.

[2] State Bank *v.* United States, 1884, 114 U. S. 401; 5 S. Ct. 888; Alabama Nat. Bank *v.* Rivers, 1897, 116 Ala. 1; 22 So. 580, 585; 67 Am. St. Rep. 95; Tanner *v.* Lee, 1904, 121 Ga. 524; 49 S. E. 592; Merchants' Loan, etc., Co. *v.* Lamson, 1899, 90 Ill. App. 18; Spaulding *v.* Kendrick, 1898, 172 Mass. 71; 51 N. E. 453; Walker *v.* Conant, 1888, 69 Mich. 321; 37 N. W. 292; 13 Am. St. Rep. 391; Case *v.* Hammond Packing Co., 1904, 105 Mo. App. 168; 79 S. W. 732; Justh *v.* Nat. Bank, 1874, 56 N. Y. 478; Stephens *v.* Board of Education 1879, 79 N. Y. 183; 35 Am. Rep. 511; Newhall *v.* Wyatt, 1893, 139 N. Y. 452; 34 N. E. 1045; 36 Am. St. Rep. 712; Bank of Charleston & Bank of State, 1866, 13 Rich. L. (S. C.) 291. *Contra:* Porter *v.* Roseman, 1905, 165 Ind. 255; 74 N. E. 1105; 112 Am. St. Rep. 222.

[3] Mason *v.* Waite, 1822, 17 Mass. 560, 563.

[4] See Barrelett *v.* Bellgard, 1874, 71 Ill. 280; Stockett *v.* Watkins' Admrs., 1830, 2 Gill & J. (Md.) 326, 343; 20 Am. Dec. 438; Sparks *v.* Purdy, 1847, 11 Mo. 219; Cernahan *v.* Chrisler, 1900, 107 Wis. 645, 83 N. W. 778.

hiring and hold the converter in assumpsit.[1] But in jurisdictions where the use of assumpsit against a tort-feasor is limited to cases in which money has been received by him, it cannot be used against a converter who has returned the goods, unless during his wrongful possession he hired the goods to others and received compensation for their use.[2]

§ 281. (2) **Deceit.** — It has been pointed out that obtaining *goods* by fraud constitutes conversion, and that consequently the victim of the fraud has the same right to elect assumpsit as in other cases of conversion (*ante*, § 278). Even where a fraud does not amount to conversion, however, — as in the case of inducing the payment of *money* not justly due, — the same rule obtains.[3] In the case just referred to, as in the case of the conversion of specific money, it is obvious that the count to be used is that for money had and received to the plaintiff's use. If the deceit consists in inducing one to render *services* to the wrongdoer, the count for work and labor should of course be employed.

[1] Janes *v.* Buzzard, 1834, Hemp. (U. S. Superior Ct. Ark.) 240; Fed. Cas., No. 7206 a; Fanson *v.* Linsley, 1878, 20 Kan. 235, (use of threshing machine); Stockett *v.* Watkins' Admrs., 1830, 2 Gill & J. (Md.) 326; 20 Am. Dec. 438, (slaves). And see Hambly *v.* Trott, 1877, Cowp. 371, 377; McSorley *v.* Faulkner, 1892, 18 N. Y. Supp. 460. *Contra:* Wynne *v.* Latham, 1859, 6 Jones L. (51 N. C.) 329.

[2] Crow *v.* Boyd's Admrs., 1849, 17 Ala. 51, (slaves).

[3] Burton *v.* Driggs, 1873, 20 Wall. (U. S.) 125; Dashaway Assn. *v.* Rogers, 1889, 79 Cal. 211; 21 Pac. 742; Minor *v.* Baldridge, 1898, 123 Cal. 187; 55 Pac. 783; Donovan *v.* Purtell, 1905, 216 Ill. 629; 75 N. E. 334; 1 L. R. A. (N. S.) 176; Warner *v.* Cammack, 1873, 37 Ia. 642; Jones *v.* Inness, 1884, 32 Kan. 177; 4 Pac. 95; Johnson *v.* Seymour, 1890, 79 Mich. 156; 44 N. W. 344; Byard *v.* Holmes, 1868, 33 N. J. L. 119; Cory *v.* Freeholders of Somerset, 1885, 47 N. J. L. 181; Sarasohn *v.* Miles, 1900, 52 App. Div. 628; 65 N. Y. Supp. 108, *aff.* 1901, 169 N. Y. 573; 61 N. E. 1134; Stroud *v.* Life Ins. Co., 1908, 148 N. C. 54; 61 S. E. 626; Brundred *v.* Rice, 1892, 49 Oh. St. 640; 32 N. E. 169; 34 Am. St. Rep. 589; Williams *v.* Smith, 1909, 29 R. I. 562; 72 Atl. 1093; Mathers *v.* Pearson, 1825, 13 Serg. & R. (Pa.) 258; Humbird *v.* Davis, 1904, 210 Pa. St. 311; 59 Atl. 1082; James *v.* Hodsden, 1874, 47 Vt. 127; Johnson *v.* Cate, 1905, 77 Vt. 218; 56 Atl. 830; Western Assurance Co. *v.* Towle, 1886, 65 Wis. 247; 26 N. W. 104.

§ 282. **Same: Inducing void marriage by false representations.** — Fraudulently to induce one to enter into a void marriage is conceded to be an actionable wrong.[1] And it has been held that the person aggrieved may "waive the tort" and sue in assumpsit for the value of services rendered the wrongdoer as a result of the fraud:

Higgins v. *Breen, Admr. of McNally*, 1845, 9 Mo. 497: Assumpsit for work and labor. McNally, representing himself to be a widower, induced the plaintiff to marry him. She lived with him until his death, when she discovered that he had a former wife living, and that her marriage to him was void. SCOTT, J. (p. 501): "If the injury of McNally was a mere tort which resulted in no benefit to himself, . . . the action would not survive; but if it can be shown that the injury resulted in advantage to him, that he was made richer, or his circumstances improved by the work and labor of the unfortunate plaintiff, then this action will lie. It is not maintained that for the deceit practiced, for the injury to her person, the plaintiff has any redress against the administrator, . . . she is only allowed the value of her work and labor which were performed under such circumstances, as the law will imply a promise to pay for them."[2]

But there are also cases in which restitution is denied:

Cooper v. *Cooper*, 1888, 147 Mass. 370; 17 N. E. 892; 9 Am. St. Rep. 721: Assumpsit. Facts similar to those in *Higgins* v. *Breen, supra*. ALLEN, J. (p. 373): "The work and labor never constituted a cause of action in tort. The plaintiff could have maintained no action of tort against the intestate for withholding payment for the work and labor in housekeeping, or for by false representations inducing her to perform the work without pay. The particular acts which she performed as a wife were not induced by the deceit, so that each would constitute a substantive cause of action, but by the position which she was deceived into assuming, and would be elements of damage in an action for that deceit. Labor in housekeeping was a

[1] Morrill *v.* Palmer, 1895, 68 Vt. 1; 33 Atl. 829; 33 L. R. A. 411.

[2] *Accord:* Fox *v.* Dawson, 1820, 8 Mart. (O. S.) (La.) 94. And see Mixer *v.* Mixer, 1905, 2 Cal. App. 227; 83 Pac. 273.

small incident to a great wrong, and the intestate owed no duty, and had no right to single that out and offer payment for it alone; and the offer to do so might as well have been deemed an aggravation of the injury to the plaintiff." [1]

Payne's Appeal, 1895, 65 Conn. 397; 32 Atl. 948; 33 L. R. A. 418; 48 Am. St. Rep. 215; Claim of Ferguson against the estate of Lizzie Seymour, deceased, for board, lodging, and other necessaries furnished said Lizzie Seymour, whom claimant had been induced to marry by false representations that she was a single woman. HAMERSLEY, J. (p. 409): "The principle the plaintiff invokes does not apply to his case; because, during the life of the intestate he had no cause of action against her, except for damage resulting from a private wrong; the injury he suffered was a personal injury, and if a consequential damage to his personal estate followed the injury, it was so dependent upon and inseparable from the personal injury which is the primary cause of action, that there is no right to maintain a separate action in respect of such consequential damage."

The reasons for denying relief, given in these cases, are not convincing. The chief arguments seem to be: (1) that the tort of inducing one to enter into a void marriage is essentially a personal injury to which the benefit obtained by the wrongdoer is merely incidental; and (2) that the value of the benefit obtained by the defendant is only a single item of consequential damages which cannot be separated from the wrong itself and made the sole basis of an action by the person wronged. In answer to the first, it is submitted that if a wrongdoer is benefited at his victim's expense to any extent whatever, the relative insignificance of such benefit, as compared with the injury suffered by his victim, affords no reason for denying to the latter the right to elect an action for restitution instead of an action for damages. As to

[1] See Graham *v.* Stanton, 1901, 177 Mass. 321; 58 N. E. 1023, where, upon the authority of Cooper *v.* Cooper, *supra*, it is said that if one takes a child into his household and falsely represents to her that he has legally adopted her, and thereby induces her to render services in household work, the child's only remedy is in tort for the deceit.

the second, it may be pointed out that the plaintiff, in electing to sue for restitution, does not separate the consequential benefit to the defendant from the wrong committed by him. The very foundation of the action for restitution is the fraud of the defendant in inducing the plaintiff to enter into the void marriage; and the only essential difference between the action in assumpsit and that of deceit, in such a case, is that in the former the plaintiff seeks to recover the value of the benefit resulting to the defendant, while in the latter he demands compensation for the damages resulting to himself.[1]

Even were there no fraudulent representation in these cases, it is submitted that restitution should be enforced upon the ground that the benefit conferred upon the defendant is conferred in reliance upon a supposed legal duty which turns out to be non-existent. But this topic is treated in another chapter (*ante*, § 184).

§ 283. (3) **Trespass on land.** — Ordinarily a mere trespasser on land derives no benefit from his wrongful act and therefore may not be sued in assumpsit. If, however, he severs and removes timber, stone, minerals, soil, or any products of the soil, he may be required to make restitution in value.[2] And since the trespass on the land and the conversion of the thing severed from the land probably constitute but a single cause of action, the election to sue in assumpsit precludes any action for damages.[3]

§ 284. **Same: Use and occupation.** — It is evident that one who wrongfully takes possession of and occupies another's land

[1] For a more extended criticism of Cooper *v.* Cooper, *supra*, see Keener, "Quasi-Contracts," pp. 323–326.

[2] Powell *v.* Rees, 1837, 7 Adol. & El. 426, (coal); Phelps *v.* Church of Our Lady, 1900, 99 Fed. 683; 40 C. C. A. 72, (stone); Asher *v.* Cornett, 1908, (Ky.) 113 S. W. 131, (timber); Welch *v.* Bagg, 1863, 12 Mich. 41, (pasturing cows: but see St. John *v.* Antrim Iron Co., 1899, 122 Mich. 68; 80 N. W. 998); Norden *v.* Jones, 1873, 33 Wis. 600; 14 Am. Rep. 782. See Stearns *v.* Dillingham, 1850, 22 Vt. 624; 54 Am. Dec. 88, (must be turned into money). But see Bigelow *v.* Jones, 1830, 10 Pick. (Mass.) 161; Parks *v.* Morris, Layfield & Co., 1907, 63 W. Va. 51; 59 S. E. 753, (assumpsit will not lie when title to land involved).

[3] Roberts *v.* Moss, 1907, 127 Ky. 657; 32 Ky. Law Rep. 525; 106 S. W. 297; 17 L. R. A. (N. S.) 280.

is unjustly benefited to the extent of the value of its use. Where possession is taken under claim of right and a question of title is thereby raised, assumpsit may be thought an unsuitable remedy.[1] But where the entry is conceded to be wrongful, assumpsit for use and occupation would seem to be appropriate. For a reason of an historical nature, however, it is unavailable.[2] Apparently because the action of debt for rent reserved survived the tenant, and moreover could not be defeated by wager of law, the courts thought it unnecessary to recognize indebitatus assumpsit as a proper remedy for the collection of rent. And though by special act of Parliament[3] indebitatus assumpsit was finally allowed against a tenant upon a parol demise, the courts have restricted its use to the cases of genuine tenancy contemplated by the statute.[4] They have held, furthermore, that since the trespasser cannot be held in assumpsit for the use and occupation of the land, the income that he may derive

[1] See Lindon *v.* Hooper, 1776, Cowp. 414; Phelps *v.* Church of Our Lady, 1900, 99 Fed. 683; 40 C. C. A. 72; Downs *v.* Finnegan, 1894, 58 Minn. 112; 59 N. W. 981; 49 Am. St. Rep. 488; Parks *v.* Morris, Layfield & Co., 1907, 63 W. Va. 51; 59 S. E. 753. But see Illinois, etc., R. Co. *v.* Ross, 1904, 26 Ky. Law Rep. 1251; 83 S. W. 635, 638.

[2] See Ames, "Assumpsit for Use and Occupation," 2 Harv. Law Rev. 377.

[3] Statutes 11 Geo. II. c. 19, sec. 14.

[4] Tew. *v.* Jones, 1844, 13 Mees. & W. 12; Adsit *v.* Kaufman, 1903, 121 Fed. 355; 58 C. C. A. 33; Stringfellow *v.* Curry, 1884, 76 Ala. 394; Stockett *v.* Watkin's Admrs., 1830, 2 Gill & J. (Md.) 326; 20 Am. Dec. 438; Central Mills Co. *v.* Hart, 1878, 124 Mass. 123; Lockwood *v.* Thunder, etc., Boom Co., 1880, 42 Mich. 536; 4 N. W. 292; Henderson *v.* Detroit, 1886, 61 Mich. 378; 28 N. W. 133; Hurley *v.* Lamoreaux, 1882, 29 Minn. 138; 12 N. W. 447; McLane *v.* Kelly, 1898, 72 Minn. 395; 75 N. W. 601; Aull Savings Bank *v.* Aull, 1883, 80 Mo. 199; Janouch *v.* Pence, 1903, 3 Neb. (Unof.) 867; 93 N. W. 217; Dixon *v.* Ahern, 1887, 19 Nev. 422; 14 Pac. 598; Smith *v.* Stewart, 1810, 6 Johns. (N. Y.) 46; 5 Am. Dec. 186; Preston *v.* Hawley, 1886, 101 N. Y. 586; 5 N. E. 770; Ackerman *v.* Lyman, 1866, 20 Wis. 454. See Woodbury *v.* Woodbury, 1866, 47 N. H. 11, 21–22; 90 Am. Dec. 555; Baldwin *v.* Bohl, 1909, 23 S. D. 395; 122 N. W. 247. But see Mayor, etc., of Newport *v.* Saunders, 1832, 3 Barn. & Ad. 411; Illinois, etc., R. Co. *v.* Ross. 1904, 26 Ky. Law Rep. 1251; 83 S. W. 635, 638; National Oil Refining Co. *v.* Bush. 1879, 88 Pa. St. 335. For a criticism of the rule, see "Action of Use and Occupation against a Trespasser," Eugene McQuillan, 23 Cent. Law Journal 387.

from letting the land is not recoverable in the count for money had and received.[1]

It is interesting to note, in this connection, that the measure of recovery in the tort action for mesne profits is not the damages suffered by the plaintiff, but the reasonable value of the use and occupation of the land,[2] — precisely the same rule as would be enforced in an action in indebitatus assumpsit.

Even if the trespass consists merely of a wrongful but not exclusive use of land — for instance, the occasional use of one's building for the storage of the trespasser's goods, or of one's private roadway for their transportation, — the wrongdoer, it would appear, is enriched to the extent of the value of such use. But here, again, indebitatus assumpsit will not lie. Moreover, in a case of this sort in which it appeared that a trespasser had used an underground roadway for the carriage of coal, relief in equity was denied on the ground that the trespasser "saved his estate expense, but he did not bring into it any additional property or value belonging to another person."[3] This decision is criticized in another section (*ante*, § 275).

§ 285. (4) **Abduction of child or servant: Inducing breach of contract.** — Where, either by force or by enticement, a minor child is taken from his parent, or an apprentice from his master, and compelled or induced to work for the benefit of his abductor, the parent or master may elect to sue in tort for damages or in assumpsit for the value of the services rendered.[4] In a leading case, *Lightly* v. *Clouston*,[5] Chief Justice MANSFIELD said:

[1] Clarance *v.* Marshall, 1834, 2 Cromp. & Mees. 495; Lockard *v.* Barton, 1884, 78 Ala. 189; King *v.* Mason, 1866, 42 Ill. 223; 89 Am. Dec. 426.

[2] See Cutter *v.* Waddingham, 1862, 33 Mo. 269; Wallace *v.* Berdell, 1885, 101 N. Y. 13; 3 N. E. 769; Morrison *v.* Robinson, 1858, 31 Pa. St. 456.

[3] Phillips *v.* Homfray, 1883, 24 Ch. Div. 439, 462.

[4] Lightly *v.* Clouston, 1808, 1 Taunt. 112, (apprentice); Foster *v.* Stewart, 1814, 3 Maul. & Sel. 191, (apprentice); Culberson *v.* Alabama Const. Co., 1907, 127 Ga. 599; 56 S. E. 765; 9 L. R. A. (N. S.) 411, (minor son); Thompson *v.* Howard, 1875, 31 Mich. 309, (minor son). And see James *v.* Le Roy, 1810, 6 Johns. (N. Y.) 274, (apprentice).

[5] 1808, 1 Taunt. 112, 114.

"In the present case the Defendant wrongfully acquires the labor of the apprentice; and the master may bring his action for the seduction. But he may also waive his right to recover damages for the tort, and may say that he is entitled to the labor of his apprentice, that he is consequently entitled to an equivalent for that labor, which has been bestowed in the service of the Defendant. . . . This case approaches as nearly as possible to the case where goods are sold and the money has found its way into the pocket of the Defendant."

There appears to be no reason for distinguishing from the case of the abduction of a child or apprentice the case of the taking *by force* of an ordinary contract servant. Since the servant has not voluntarily quit his master's employ, the master, as between himself and the abductor, continues to be entitled to his services and consequently to the value of the benefit derived therefrom by the abductor. But *inducing* a contract servant to break his contract is an essentially different case. There is a tort, to be sure, but from the moment the contract is broken the master is not entitled to the labor of the servant as against another employer, even though such employer be the person who committed the tort. It seems, therefore, that in this case the action for damages is the only remedy.

§ 286. (5) **False imprisonment: Service under compulsion.** — If one who is guilty of the tort of false imprisonment is benefited by the labor which his victim is compelled to perform, he may, at the option of the plaintiff, be held responsible in assumpsit for work and labor for the reasonable value of the services rendered.[1] This rule has been applied to one who compelled a free negro to work as a slave,[2] and to a prison-labor contractor;[3] and in one case in which the plaintiff had been wrongfully held as a lunatic and "let out" for profit by the overseers of the poor, he was

[1] Patterson *v.* Prior, 1862, 18 Ind. 440; 81 Am. Dec. 367; Abbot *v.* Town of Fremont, 1887, 34 N. H. 432; Negro Peter *v.* Steel, 1801, 3 Yeates (Pa.) 250.

[2] Negro Peter *v.* Steel, 1801, 3 Yeates (Pa.) 250.

[3] Patterson *v.* Prior, 1862, 18 Ind. 440; 81 Am. Dec. 367. But see, *contra*, Sloss Iron Co. *v.* Harvey, 1898, 116 Ala. 656; 22 So. 994.

permitted to recover from the township, in an action for money had and received, the sum paid for his services.[1]

If the defendant, though guilty of the tort of false imprisonment, in good faith has paid a third party for the services of the plaintiff, he should be liable in assumpsit only to the extent that the value of the services received by him exceeded the sum paid therefor.[2]

§ 287. (6) **Usurpation of office.** — The salary or fees appurtenant to a public office are said to follow the title to the office. The *de jure* officer, therefore, is entitled to such salary or fees as against an officer *de facto*, even though the latter holds under an honest claim of right and faithfully performs the duties of the office.[3] On grounds of public policy, however, the payment in good faith of such salary or fees to the *de facto* officer while still in office, discharges the corporation from liability to the *de jure* officer.[4] In that case, the *de jure* officer's only recourse is against the officer *de facto*, from whom he may recover, in an action for money had and received, the full amount of the fees or salary received by him,[5] without deducting the value of the

[1] Abbot *v.* Town of Fremont, 1887, 34 N. H. 432.

[2] See Thompson *v.* Bronk, 1901, 126 Mich. 455; 85 N. W. 1084. In this case the fact that the defendant had paid the price agreed upon in his contract with the prison warden was regarded by the court as discharging him from liability to the plaintiff.

[3] Mayfield *v.* Moore, 1870, 53 Ill. 428; 5 Am. Rep. 52; McCue *v.* Wapello County, 1881, 56 Ia. 698; 10 N. W. 248; 41 Am. Rep. 134; Dolan *v.* Mayor of N. Y., 1877, 68 N. Y. 274; 23 Am. Rep. 168; Commonwealth *v.* Slifer, 1855, 25 Pa. St. 23; 64 Am. Dec. 680. See Mechem, "Public Officers," § 331, and other cases there cited. *Contra:* Erwin *v.* Jersey City, 1897, 60 N. J. L. 141; 37 Atl. 732; 64 Am. St. Rep. 584.

[4] Board of Commrs. *v.* Rhode, 1907, 41 Colo. 258; 95 Pac. 551; 16 L. R. A. (N. S.) 794; 124 Am. St. Rep. 134; Commrs. *v.* Anderson, 1878. 20 Kan. 298; 27 Am. Rep. 171; Auditors *v.* Benoit, 1870, 20 Mich, 176; 4 Am. Rep. 382; Dolan *v.* Mayor of N. Y., 1877, 68 N. Y. 274; 23 Am. Rep. 168; Stearns *v.* Sims, 1909, 24 Okl. 623; 104 Pac. 44; 24 L. R. A. (N. S.) 475. See Mechem, "Public Officers," § 332, and other cases there cited; 29 Cyc. 1430, n. 99. *Contra:* People *v.* Smyth, 1865, 28 Cal. 21.

[5] Arris *v.* Stukely, 1676, 2 Mod. 260; Mayfield *v.* Moore, 1870, 53 Ill. 428; 5 Am. Rep. 52; Rule *v.* Tait, 1888, 38 Kan. 765; 18 Pac. 160; People *v.* Miller, 1872, 24 Mich. 458; 9 Am. Rep. 131; Sandoval *v.*

services rendered by such *de facto* officer to the municipality or any sum which the *de jure* officer has or might have earned in other employment during the period of his wrongful exclusion from office.[1] Where the *de facto* officer performs the duties of the office in the honest belief that he is legally entitled thereto, there would appear to be no injustice in permitting him to retain the reasonable value of the services actually rendered by him. But it is declared that "On the basis of a sound public policy, the principle commends itself, for the reason that one would be less liable to usurp or wrongfully retain a public office, and defeat the will of the people or the appointing power, if no benefit, but a loss would result from such wrongful retention or usurpation of an office." [2]

It should be added, perhaps, that the fees received by a *de facto* officer which are not payable by law and are consequently in the nature of gratuities, are not recoverable from him by the *de jure* officer.[3] This on the obvious ground that the defendant's enrichment is not at the plaintiff's expense, since the plaintiff, if in office, would not have been entitled to, and perhaps would not have received, the fees in question.

§ 288. (7) **Infringement of patent rights.** — The usual and frequently the only adequate remedy, in case of the invasion of the exclusive rights secured by letters patent, is a suit in equity for an injunction and an accounting of profits.[4] Where the

Albright, 1908, 14 N. M. 345; 93 Pac. 717, *aff.* 1910, 216 U. S. 331; 30 S. Ct. 318; Nichols *v.* MacLean, 1886, 101 N. Y. 526; 5 N. E. 347; 54 Am. Rep. 730; Hudgens *v.* Kennedy, 1850, 5 Strob. (S. C.) 44. See Mechem, "Public Officers," § 333, and other cases there cited; 29 Cyc. 1394, n. 74. *Contra:* Stuhr *v.* Curran, 1882, 44 N. J. L. 181; 43 Am. Rep. 353.

[1] United States *v.* Addison, 1867, 6 Wall. (U. S.) 291. And see Fitzsimmons *v.* City of Brooklyn, 1886, 102 N. Y. 536; 7 N. E. 787; 55 Am. Rep. 835. But necessary expenses of maintaining office may be deducted: Sandoval *v.* Albright, 1908, 14 N. M. 345; 93 Pac. 717, *aff.* 1910, 216 U. S. 331; 30 S. Ct. 318; Kreitz *v.* Behrensmeyer, 1894, 149 Ill. 496; 36 N. E. 983; 24 L. R. A. 59; Mayfield *v.* Moore, 1870, 53 Ill. 428; 5 Am. Rep. 52.

[2] Kreitz *v.* Behrensmeyer, 1894, 149 Ill. 496, 503; 36 N. E. 983; 24 L. R. A. 59.

[3] Boyter *v.* Dodsworth, 1796, 6 Term R. 681.

[4] U. S. R. S. § 4921.

patent has expired, however, relief in equity is ordinarily not obtainable; and in any event the patentee may sue the infringer at law as a tort-feasor and recover compensatory damages.[1] Since the tort is one which benefits the wrongdoer, it has been supposed that the patentee may elect to sue in assumpsit for restitution.[2] But the rights and remedies of a patentee are created and defined by Congress, and the only action at law provided for by the statute is an action on the case for damages.[3] Whether this includes an action in assumpsit for restitution may be doubted.[4] It may be noted, however, that if an action for restitution is allowable, the true measure of recovery is not the profits actually reaped by the infringer, as in the case of a suit in equity for an injunction and accounting, but the value of the use of the invention — ordinarily determined by reference to the royalty or price paid for such use by licensees. For it is only to the extent of the value of the use that the infringer is benefited at the patentee's expense.

§ 289. (III) **The liability of joint tort-feasors.** — In England, the liability of joint tort-feasors is joint;[5] in America, joint and several.[6] In either view, of course, no attention is paid, in assessing damages, to the actual division of the spoils. But what if the injured party elects to sue in assumpsit for restitution

[1] U. S. R. S. § 4919.

[2] See Professor A. L. Corbin, "Waiver of Tort and Suit in Assumpsit," 19 Yale Law Jour. 221, 231. Also: Schillinger *v.* United States, 1894, 155 U. S. 163; 15 S. Ct. 85; Steam Stone-Cutter Co. *v.* Sheldons, 1883, 15 Fed. 608, (C. C. Vt.). But see, *contra*, B. F. Avery & Sons *v.* McClure, 1909, 94 Miss. 172; 47 So. 901; 22 L. R. A. (N. S.) 256.

[3] See U. S. R. S. § 4919.

[4] In May *v.* Logan, 1887, 30 Fed. 250, 259, (C. C. Ohio), JACKSON, J., said: "If Congress had not directed that an action on the case should be the remedy for the recovery of damages for the infringement of a patent, the patentee could, in cases like the present, waive what is called the tortious act and bring assumpsit upon the implied contract against the county to recover the value of the property appropriated." But see Steam Stone-Cutter Co. *v.* Sheldons, 1883, 15 Fed. 608, (C. C. Vt.).

[5] Brinsmead *v.* Harrison, 1872, L. R. 7 C. P. 547.

[6] Lovejoy *v.* Murray, 1865, 3 Wall. (U. S.) 1; Elliott *v.* Hayden, 1870, 104 Mass. 180; McMannus *v.* Lee, 1869, 43 Mo. 206; 97 Am. Dec. 386.

instead of in trespass for damages? Clearly, he is not entitled to a joint judgment if one of the wrongdoers has derived no benefit from the commission of the tort;[1] nor is he entitled to a joint judgment, if each has received a benefit, for the sum of the benefits separately received by them.[2] The obligation to make restitution is essentially several, each tort-feasor being liable to the extent of the benefit received by him. Even if the proceeds of the tort are not divided, but are held by one of the tort-feasors for the benefit of all, or by a common agent, it would seem that each should be answerable only to the extent of the value of his interest in the booty. It has been held that "if the money was received by a common agent, those for whose benefit it was thus received were jointly liable for the whole sum,"[3] but since a joint judgment is enforceable in full against any one obligor, this rule would permit the collection of the entire proceeds of the tort from one who has only a fractional interest therein — a violation of the fundamental principle which underlies the tort-feasor's obligation in assumpsit.

§ 290. (IV) **Rights of owners in common.** — It is generally held that in case of a tort against common owners or tenants of property they must sue jointly, whether they elect to seek damages or restitution:

Irwin's Admr. v. *Brown's Extrs.*, 1860, 35 Pa. St. 331: Assumpsit to recover a share of the proceeds of a wrongful sale of timber belonging to the plaintiff's intestate and two others as tenants in common. LOWRIE, C.J. (p. 332): "To enforce a joint or several duty, we impute a joint or several contract. Now, whether we treat the defendant's wrong as waste or trespass,

[1] Minor *v.* Baldridge, 1898, 123 Cal. 187; 55 Pac. 783, 784; Patterson *v.* Prior, 1862, 18 Ind. 440; 81 Am. Dec. 367; Limited Investment Asso. *v.* Glendale Investment Asso., 1898, 99 Wis. 54; 74 N. W. 633.

[2] But see, *contra*, Gilmore *v.* Wilbur, 1831, 12 Pick. (Mass.) 120; 22 Am. Dec. 410; City Nat. Bank *v.* Nat. Park Bank, 1884, 32 Hun (N. Y. Sup. Ct.) 105, 111.

[3] Neate *v.* Harding, 1851, 6 Exch. 349; National Trust Co. *v.* Gleason, 1879, 77 N. Y. 400, 404; 33 Am. Rep. 632; New York Guaranty, etc., Co. *v.* Gleason, 1879, 78 N. Y. 503. See Brundred *v.* Rice, 1892, 49 Ohio St. 640; 32 N. E. 169; 34 Am. St. Rep. 589.

his legal liability for it was to the tenants in common jointly; and if the tort be waived and a constructive contract substituted, it must be a joint one. One cannot, by his election of a substitute, destroy the primary action to which his co-tenants were entitled with him." [1]

There is authority, however, for the view that one of two or more tenants in common may sue severally in assumpsit,[2] although no good reason for the distinction is apparent.

§ 291. (V) **Infancy or insanity as a defense or in mitigation.** — It is hardly necessary to point out that the infancy or insanity of a tort-feasor is no defense to an action for restitution.[3] The form of action is contractual, but "the validity of a plea as a defense may, and ordinarily should turn, not upon the form of the action, but its substantial merit." [4] Moreover, while evidence of immaturity or mental deficiency may be admitted under some circumstances in mitigation of damages, it is quite irrelevant when the plaintiff is seeking, not damages, but restitution.

§ 292. (VI) **Measure of recovery.** — In the preceding discussion of the various torts in which there is an election to sue for restitution, the measure of recovery has from time to time been stated. It is fundamental that the plaintiff's recovery must be limited to the value of the benefit unjustly enjoyed by the defendant at the plaintiff's expense.[5] Consequently, if there are circumstances which make it equitable for a wrong-doer to retain part of the proceeds of his wrong, only the balance may be recovered from him. Such was thought to be the case in the Wisconsin case of *Western Assurance Co.* v. *Towle.*[6] The

[1] Also: Gilmore *v.* Wilbur, 1831, 12 Pick. (Mass.) 120; 22 Am. Dec. 410; White *v.* Brooks, 1861, 43 N. H. 402.

[2] Tankersley *v.* Childers, 1853, 23 Ala. 781.

[3] Bristow *v.* Eastman, 1794, 1 Esp. 172; Elwell *v.* Martin, 1859, 32 Vt. 217.

[4] Elwell *v.* Martin, 1859, 32 Vt. 217, 222.

[5] Culberson *v.* Alabama Const. Co., 1907, 127 Ga. 599; 56 S. E. 657, 767–9; 9 L. R. A. (N. S.) 411; Western Assurance Co. *v.* Towle, 1886, 65 Wis. 247, 258–61; 26 N. W. 104; Huganir *v.* Cotter, 1899, 102 Wis. 323; 78 N. W. 423; 72 Am. St. Rep. 884.

[6] 1886, 65 Wis. 247, 257; 26 N. W. 104.

defendants, by fraudulent representations as to the extent of a loss, which fraudulent representations, under the terms of the policy, worked a forfeiture of the right to recover anything upon the policy, had obtained payment as for a total loss. The plaintiff brought this action to recover the full amount paid, but it was held that it was entitled to recover only the amount paid over and above the actual loss. Said the court:

"The action for money had and received is in some sense an equitable action, and the insurance company having voluntarily paid the money on an alleged loss claimed by the defendants, they can only recover back so much as in equity and good conscience they ought not to have paid. . . . False swearing and false valuation in proof of loss might have been a good defense to a recovery upon the policy had the plaintiff refused to pay the loss; but it cannot be made the basis of a right to recover back money already paid upon the policy. The plaintiff's right to recover depends upon proof establishing the fact that the company had paid more money than covered the loss sustained by the defendants, and that such payment was procured by the false and fraudulent acts of the defendants."

The precise amount recoverable may depend in some cases upon the form of assumpsit used. Thus, if A wrongfully seizes B's goods and is sued in assumpsit for goods sold and delivered (as, in many jurisdictions, he may be), the measure of recovery is the value of the goods at the time of the conversion. But if A, after seizing the goods, sells them, and is sued, not for goods sold and delivered, but for money had and received, the measure of recovery is the sum realized from the sale, whether such sum exceeds or falls short of the value of the goods at the time of the original conversion. This, presumably, either upon the theory that the owner may elect to regard the sale of his goods, rather than the original taking, as the conversion, and the amount of money received by the converter as conclusive evidence of the value of that which has been taken from him, or upon the theory that the converter holds the proceeds of the sale as a sort of constructive trustee for the owner. So, in cases of services ren-

dered under compulsion, the wrongdoer may be held, in assumpsit for work and labor, for the value of the services; but if he has sold the services, *i.e.* compelled the plaintiff to work for a third party, and is sued for money had and received, the amount received by the wrongdoer is the amount recoverable from him.[1]

Since the obligation is to make restitution, not to account, profits, as such, are not recoverable. Thus, if A owns a vehicle for the carriage of passengers which he lets for fifteen dollars per day, and B wrongfully takes and uses the vehicle for five days, thereby making an actual profit of one hundred dollars, A should be allowed to recover, not one hundred dollars, the profit realized by the wrongdoer, but seventy-five dollars, the value of that which was taken from the party injured. However, if B, instead of using the vehicle himself, lets it to C for five days at twenty dollars per day, and receives from C the sum of one hundred dollars, A would probably be allowed, in a count for money had and received, to recover the amount received by B from C.

§ 293. **Same: Interest.** — The plaintiff is entitled to interest from the time when the principal sum recovered by him ought to have been paid, — in other words from the date when the cause of action arose. This has been thought to mean from the time of an election to sue in assumpsit. Said the court in *Dougherty* v. *Chapman:* [2]

"By electing to waive the tort, the plaintiff becomes entitled to the proceeds of the sale, but up to that time he was not entitled to such proceeds. The right to the proceeds accrued by force, and at the moment of election, and not before. As the plaintiff was not entitled to the proceeds of the sale until he made an election, as a matter of course he was not entitled to interest prior thereto."

Here again is the common fallacy that the obligation to make restitution is imposed upon the defendant by the act of the plain-

[1] Abbot *v.* Town of Fremont, 1887, 34 N. H. 432.
[2] 1888, 29 Mo. App. 233, 242.

tiff in electing to "waive the tort." In the true view of the case, the obligation arises, not from an act of the plaintiff, but by operation of law immediately upon receipt of the benefit by the defendant, and interest is therefore properly recoverable from the date of such receipt.

Applying the rule that the plaintiff is entitled to interest from the date when the principal sum ought to have been paid, it is clear that when the judgment is for money received by the defendant, either from the plaintiff or from a third party, interest from the date of the receipt of such money by the defendant should be added;[1] that when the judgment is for the value of goods wrongfully taken or detained, interest should run from the date of such wrongful taking or detention; that when the judgment is for the value of the use of the plaintiff's goods or the value of the compulsive service of the plaintiff or his child or apprentice, interest should be allowed from the date of the termination of such use or service, or, perhaps, from the date of the expiration of each week or month (depending upon the unit period for which property of the kind is ordinarily hired or services of the kind ordinarily obtained) of such use or service.

§ 294. (VII) **Statute of limitations.** — The statutory period which bars actions for tort is frequently, if not generally, different from that which bars actions on contract. The question arises, therefore: is an action against a tort-feasor for restitution an action for tort or an action on contract? In *form*, of course, it is contractual, but unless the language of the statute clearly indicates a contrary intention, it seems but reasonable to suppose that the different periods are meant to apply, not to different *forms* of action, but to different *causes* of action, *i.e.* to different kinds of wrong. For there is no conceivable reason why, in the case of a particular wrong, one *form* of action should be available after another is barred; the purpose of the statute is that upon the expiration of the specified period *no* action shall be brought for the redress of the wrong. The question, then,

[1] City of Newburyport *v.* Fidelity, etc., Ins. Co., 1908, 197 Mass. 596, 84 N. E. 111. But see York *v.* Farmers' Bank, 1904, 105 Mo. App. 127; 79 S. W. 968, 972, allowing interest from date of demand.

should be stated in these terms: Is the *cause* of action against the tort-feasor a cause of action in contract, within the meaning of the term " contract " in statutes of limitation, or is it one in tort?

If the obligation of the tort-feasor to make restitution is genuinely quasi contractual, *i.e.* a primary obligation, it may well be that the term " contract " is broad enough to include it. But if, as seems probable (see *ante*, § 270), the obligation is but a secondary one, arising, like the obligation to pay damages, upon the breach of the primary obligation not to commit the tort, the only cause of action, accurately speaking, is the commission of a tort, and the statutory limitation as to torts would seem to apply.

The former view, *i.e.* that the cause of action is in contract, as the term is used in the statute, rather than in tort, has the support of what judicial authority there is:

Kirkman v. *Phillips*, 1872, 7 Heisk. (54 Tenn.) 222: Attachment bill to recover the value of certain machinery. The bill was dismissed upon demurrer, the ground of demurrer being that the recovery sought by the bill being for a tort, the same was barred by the statute of limitation of three years. The Supreme Court held that the demurrer should not have been sustained, NICHOLSON, C.J., saying (p. 224): "If the original owner of the property elect to sue for the property, or for damages for the conversion, the action will be barred by the statute of three years. But if the party elects to sue for the value of the property, the action will be barred in six years. It is true, as argued, that a wrongdoer may obtain a title to the property by three years adverse possession, and yet be liable for three years after his title is perfected to pay the original owner the value thereof. This is a necessary consequence of the right which the original owner has to elect whether he will sue for property or its value. During six years his right to sue for the value is as perfect as his right to sue for the property within the three years. This right is not interfered with by the provisions of the Code abolishing the distinctions in the forms of actions. The statute of limitations applicable to the cause depends upon the nature and character of the action, and not

upon its form. In the case before us, the complainant has elected to waive the tort and to sue for the value of the property converted, and in so doing he is entitled to the benefit of the six years statute." [1]

Another question is now encountered: when does the statute commence to run? The answer to this question depends upon the answer to the one just considered. If the statutory provision as to actions on contract applies, the period of limitation must be computed from the date of the implied or fictitious promise to make restitution, which is the date of the receipt by the defendant of the benefit reaped from the tort, but not necessarily the date of the commission of the tort. On the other hand, if the provision as to actions for tort applies, the period must be computed from the time of the commission of the tort, even though the benefit sought to be recovered is not received until a later date.

Although there is not much authority on this point either, it has been held in at least one case that the statute runs from the date of the receipt of the benefit sought to be recovered:

Miller v. *Miller*, 1828, 7 Pick. (Mass.) 133; 19 Am. Dec. 264: Assumpsit for money had and received. The defendant wrongfully sold wood standing on land belonging to him and the plaintiff's testator as tenants in common, and payments were made by the purchasers to the defendant at different times subsequent to the sales. The jury were instructed to find a verdict for the plaintiff for one half of the amount which the defendant had received within six years before the commencement of the action, and the Supreme Court upheld the instruction. PARKER, C.J. (p. 136): "As to the objection founded on the statute of limitations, we think the jury were instructed right, *viz.* that the statute began to run from the time when the money was received, and not from the time of the sale of the wood. In this action the plaintiff affirms the sale and asks for his share of the proceeds.

[1] See also Miller *v.* Miller, 1828, 7 Pick. (Mass.) 133; 19 Am. Dec. 264; Whitaker *v.* Poston, 1908, 120 Tenn. 207; 110 S. W. 1019, 1021, (approving Kirkman *v.* Phillips). But see Bell *v.* Bank of California, 1908, 153 Cal. 234, 242–3; 94 Pac. 889.

He had a right to waive his action of trespass given by the statute and to consider the defendant as his agent in disposing of the wood. This is for the benefit of the defendant, as he can deduct all reasonable charges, and is answerable only to the extent of funds which he has received."

A limitation of the doctrine of *Miller* v. *Miller* was established, however, in the later case of *Currier* v. *Studley*,[1] in which it was held in substance that since one who wrongfully takes another's property and holds it until the right of the owner to recover it is barred by the statute becomes himself the owner, if he subsequently sells the property and receives the purchase price he cannot be held liable by the former owner for money had and received.[2]

Under the decisions in *Kirkman* v. *Phillips* and *Miller* v. *Miller*, and notwithstanding the wholesome limitation established by *Currier* v. *Studley*, the right to sue a tort-feasor in assumpsit may exist for many years after the right to sue in tort has been barred by the statute. Suppose, for example, that under a statute of limitations requiring actions on contract to be brought within six years and actions for conversion of goods within three years, A wrongfully takes B's goods on August 1, 1900, sells them on July 1, 1903, and receives the proceeds of the sale on June 1, 1904. The right to sue for conversion would be barred August 2, 1903, but assumpsit for goods sold, if allowed at all, would be available until August 2, 1906, and assumpsit for money had and received until June 2, 1910. Furthermore, in a jurisdiction in which the right to sue in assumpsit is limited to cases in which money has been received by the tort-feasor, there would be a period of ten months, between the barring of the right to sue for conversion and the inception of the right to sue for money had and received, during which B would be without any remedy.

[1] 1893, 159 Mass. 17; 33 N. E. 709.

[2] This decision was anticipated by Professor Keener, who said, in his work on "Quasi-Contracts," at p. 177: "If the sale is not made until the injured party has lost his right to sue for the conversion, the tort-feasor has acquired title, and the sale was a sale of his own property."

The possibility of such an absurd result, it is submitted, proves the unwisdom of regarding the action in assumpsit, in these cases, as an action on contract. It would be much more reasonable to regard it as an action in tort, for then it might consistently be held that the statute runs from the date of the commission of the tort, and both remedies would be barred at the same time. It is true that in case the benefit resulting to the tort-feasor were not received by him within the period of limitation, the plaintiff would be deprived altogether of his election to sue in assumpsit; but in view of the fact that he has an action for damages in any event, this seems an evil of smaller proportions than that of allowing the plaintiff in many cases to defeat the policy of the statute of limitations by the simple expedient of electing to sue for money had and received instead of for damages.

§ 295. (VIII) **Effect of judgment against one of two tort-feasors.** — Whether the pursuit of one remedy to a judgment against one tort-feasor will prevent a subsequent resort to the alternative remedy against another may depend upon whether there is a separate election as to each wrongdoer — a question hereafter to be considered (*post*, § 299). But there is another and underlying question that must be decided: will a judgment against one tort-feasor operate as a bar to *any and all subsequent proceedings* against another? By the weight of authority it will not;[1] but there are some decisions to the con-

[1] *In the case of joint tort-feasors:* Lovejoy *v.* Murray, 1865, 3 Wall. (U. S.) 1; Amer. Bell Tel. Co. *v.* Albright, 1887, 32 Fed. 287; Blann *v.* Crocheron, 1852, 20 Ala. 320; Sheldon *v.* Kibbe, 1819, 3 Conn. 214; 8 Am. Dec. 176; Elliot *v.* Porter, 1837, 5 Dana (35 Ky.) 299; 30 Am. Dec. 689; Johnson *v.* McKenna, 1907, 73 N. J. Eq. 1; 67 Atl. 395; Wright *v.* Lathrop, 1825, 2 Ohio 33, 52; 15 Am. Dec. 529; Sanderson *v.* Caldwell, 1826, 2 Aiken (Vt.) 195. And see Fox *v.* Northern Liberties, 1841, 3 Watts & Serg. (Pa.) 103.

In the case of successive converters: Matthews *v.* Menedger, 1840, 2 McLean (U. S. C. C.) 145; Fed. Cas., No. 9289; Spivey *v.* Morris, 1850, 18 Ala. 254; 52 Am. Dec. 224; McGee *v.* Overby, 1851, 12 Ark. 164; Atwater *v.* Tupper, 1877, 45 Conn. 144; 29 Am. Rep. 674; Sharp *v.* Gray, 1844, 5 B. Mon. (44 Ky.) 4; Hopkins *v.* Hersey, 1841, 20 Me. 449; Osterhout *v.* Roberts, 1827, 8 Cow. (N. Y.) 43.

It has been held that whether or not a judgment is a bar, execution is. White *v.* Philbrick, 1827, 5 Greenl. (Me.) 147; 17 Am. Dec. 214;

trary,[1] most of which rest upon the theory that in the case of joint or successive conversions a judgment against one converter invests him with title to the converted article.

At what time title passes to a converter is a mooted question. It is usually said that in England title passes by the judgment, while in America, by the weight of authority, it does not pass until the judgment is satisfied. But the authorities are in confusion,[2] and Professor Ames advanced the theory that title passes at the time of the conversion, subject to a right of action in the injured person for the recovery of the article or damages for its conversion.[3]

If title does not pass until satisfaction, it is plain that the entry of judgment against one converter should be no bar to subsequent proceedings against another.

If title passes at the time of the conversion, subject to a right of action in the former owner, the entry of judgment against one converter should have no effect upon the right of action against another. Said Professor Ames:[4]

"Let us suppose, for instance, that B converts the chattel of A, and, before judgment recovered against him in Trespass

Campbell *v.* Phelps, 1822, 1 Pick. (Mass.) 62; 11 Am. Dec. 139. But see Osterhout *v.* Roberts, *supra*, and Sheldon *v.* Kibbe, *supra*, in which it is said that execution against the person is not a bar.

[1] *In the case of joint tort-feasors:* Brown *v.* Wootton, 1605–06, Yelv. 67; Cro. Jac. 73; Buckland *v.* Johnson, 1854, 15 C. B. 145; Brinsmead *v.* Harrison, 1872, L. R. 7 C. P. 547; Hunt *v.* Bates, 1862, 7 R. I. 217; 82 Am. Dec. 592; Petticolas *v.* City of Richmond, 1897, 95 Va. 456; 28 S. E. 566; 64 Am. St. Rep. 811.

In the case of successive converters: See Lytle *v.* Bank of Dothan, 1899, 191 Ala. 215; 26 So. 6; Marsh *v.* Pier, 1833, 4 Rawle (Pa.) 273; 26 Am. Dec. 131; Fox. *v.* Northern Liberties, 1841, 3 Watts & Serg. (Pa.) 103.

[2] See Buckland *v.* Johnson, 1854, 15 C. B. 145; Miller *v.* Hyde, 1894, 161 Mass. 472; 37 N. E. 760; 25 L. R. A. 42; 42 Am. St. Rep. 424, (and note); Livingston *v.* Bishop, 1806, 1 Johns. (N. Y.) 290; 3 Am. Dec. 330; Scott, "Cases on Quasi-Contracts," pp. 148–149, note.

[3] "The Disseisin of Chattels," 3 Harv. Law Rev. 23, 313; same essay, "Select Essays in Anglo-American Legal History," III, 567–80. See also Professor Corbin, "Waiver of Tort and Suit in Assumpsit," 19 Yale Law Jour. 221, 242.

[4] 3 Harv. Law Rev. 313, 327.

or Trover, sells it to C, or is in turn dispossessed by C. C, the new possessor, will hold the chattel, as B held it, subject to A's right to recover it. The change of possession simply enlarges the scope of A's remedies; for his new rights against C do not destroy his old rights to sue B, in Trespass or Trover. Nor will an unsatisfied judgment against B in either of these actions affect his right to recover the chattel from C. It is no longer a question of double vexation to one defendant for a single wrong. Not until the judgment against B is satisfied can C use it as a bar to an action against himself." [1]

If title passes upon the entry of judgment, a judgment against one converter should constitute a defense to one who subsequently buys the article from him,[2] but the wrongful act of one who joined in the original conversion, or who purchased the goods from the first converter before the entry of judgment against him, does not become rightful merely by virtue of the judgment,[3] unless it be held that the judgment passes title as of the date of the conversion.[4]

§ 296. (IX) **Effect of judgment in favor of one of two alleged tort-feasors.** — It has been suggested that a judgment adverse to the plaintiff in an action against one of two alleged joint wrongdoers should bar any further action against the other, for two reasons: "First, the plaintiff has had one day in court on the issue of whether there was a joint tort or not. Secondly, it would be unfair to the defendant who won, to be subjected to a further action for contribution by the second defendant who lost, in those cases where contribution would be allowed." [5] The

[1] Likewise, a judgment against one of two or more joint converters is declared by Professor Ames to be no bar to an action against another.

[2] But see, *contra*, Goff *v.* Craven, 1884, 34 Hun (N. Y. Sup. Ct.) 150.

[3] Atwater *v.* Tupper, 1877, 45 Conn. 144; 29 Am. Rep. 674.

[4] Buckland *v.* Johnson, 1854, 15 C. B. 145.

[5] Professor Corbin, "Waiver of Tort and Suit in Assumpsit," 19 Yale Law Jour. 221, 241. And see, *accord*, Ferrers *v.* Arden, 1599, Cro. Eliz. 668; Sheldon *v.* Kibbe, 1819, 3 Conn. 214, 220; 8 Am. Dec. 176; City of Anderson *v.* Fleming, 1903, 160 Ind. 597; 67 N. E. 443; 66 L. R. A. 119, (*cf.* Fleming *v.* City of Anderson, 1905, 39 Ind. App. 343; 76 N. E. 266, 268); Emery *v.* Fowler, 1855, 39 Me. 326; 63 Am.

first reason appears to be sound in case the judgment is one which establishes the fact that the plaintiff has no cause of action against any one; the second seems to affect the justice of enforcing contribution against one who has proven that he is not a tort-feasor rather than the justice of allowing the plaintiff to proceed further against another alleged tort-feasor.

What is the effect of a judgment adverse to the plaintiff in an action against one of two successive alleged converters? Ordinarily it should not prevent further proceedings against the other, for though one is not guilty the other may be. But a judgment which establishes the fact that the first alleged converter had title should be conclusive in favor of the second.[1]

§ 297. (X) **Effect of satisfaction by one of two tort-feasors.** — It is hardly necessary to say that if two joint wrongdoers or successive converters are sued separately, either for damages or for restitution, the payment of one judgment in whole or in part will operate to reduce the other *pro tanto;* and if the sum paid on one judgment is equivalent to the whole of the other, the latter will be extinguished.[2] For the person injured is under no circumstances entitled to double satisfaction for a single injury.[3]

§ 298. (XI) **What constitutes an election.** — What constitutes an election between the right to recover damages and the right to restitution is a question not free from difficulty. An unsatisfied demand for the proceeds of a conversion, either upon the

Dec. 627. But see, *contra*, Old Dominion, etc., Co. *v.* Bigelow, 1909, 203 Mass. 159, 216–19; 89 N. E. 193; Nelson *v.* Illinois, etc., R. Co. 1910, 98 Miss. 295; 53 So. 619; 31 L. R. A. (N. S.) 689.

[1] See Portland Gold, etc., Mining Co. *v.* Stratton's Independence, 1907, 158 Fed. 63; 85 C. C. A. 393; 16 L. R. A. (N. S.) 677; Marsh *v.* Pier, 1833, 4 Rawle (Pa.) 273; 26 Am. Dec. 131.

[2] But see Westbrook *v.* Mize, 1886, 35 Kan. 299; 10 Pac. 881, (satisfied judgment against one joint tort-feasor — whether for all or part of the converted property — bar to further action against the other).

[3] Cooper *v.* Shepherd, 1846, 3 C. B. 266; Ayer *v.* Ashmead, 1863, 31 Conn. 447; 83 Am. Dec. 154; McCoy *v.* Louisville, etc., R. Co., 1905, 146 Ala. 333; 40 So. 106.

converter,[1] or upon a court into which the money has been paid,[2] is held not to be conclusive. But the acceptance, by the owner of goods wrongfully sold, of the proceeds of the sale, is an election.[3] The prosecution of one remedial right to judgment on the merits — whether in favor of the plaintiff or the defendant — is likewise an election.[4] *Nemo debet bis vexari pro eadem causa.* The effect of the commencement of an action, either in tort or assumpsit, is disputed, but by what is believed to be the weight of authority the commencement of an action in a court of competent jurisdiction is decisive.[5] The conflict of authority rests upon a difference of opinion as to the essential nature of an election. By some courts, apparently, it is conceived to be merely an "unequivocal act," *i.e.* an act consistent with a determination to pursue one remedy but inconsistent with a determination to pursue the other. In *Scarf* v. *Jardine*,[6] for example, Lord BLACKBURN said:

"The principle, I take it, running through all the cases as to what is an election is this, that where a party in his own mind

[1] Valpy *v.* Sanders, 1848, 5 C. B. 886; Baker *v.* Hutchinson, 1906, 147 Ala. 636; 41 So. 809, 811.

[2] Morris *v.* Robinson, 1824, 3 Barn. & Cr. 196.

[3] Brewer *v.* Sparrow, 1827, 7 Barn. & Cr. 310; Lythgoe *v.* Vernon, 1860, 5 Hurl. & Nor. 180; Smith *v.* Baker, 1873, L. R. 8 C. P. 350.

[4] Hitchin [or Kitchin] *v.* Campbell, 1772, 2 W. Bl. 827; Duncan & Johnson *v.* Stokes, 1873, 47 Ga. 593; Bacon *v.* Moody, 1903, 117 Ga. 207; 43 S. E. 482; Roberts *v.* Moss, 1907, 127 Ky. 657; 32 Ky. Law Rep. 525; 106 S. W. 297; Ware *v.* Percival, 1873, 61 Me. 391; 14 Am. Rep. 565; Walsh & McKaig *v.* Chesapeake, etc., Canal Co., 1882, 59 Md. 423; International Paper Co. *v.* Purdy, 1909, 136 App. Div. 189; 120 N. Y. Supp. 342; Parker *v.* Panhandle Nat. Bank, 1895, 11 Tex. Civ. App. 702; 34 S. W. 196, 198. And see 15 Cyc. 259, n. 50.

In Nanson *v.* Jacob, 1887, 93 Mo. 331; 6 S. W. 246; 3 Am. St. Rep. 531, it was declared that the allowance of a claim by an assignee for the benefit of creditors "was to all intents and purposes a judgment . . . and conclusive as such."

[5] Daniels *v.* Smith, 1884, 15 Ill. App. 339; Thompson *v.* Howard, 1875, 31 Mich. 309; Thomas *v.* Watt, 1895, 104 Mich. 201; 62 N. W. 345; Carroll *v.* Fethers, 1899, 102 Wis. 436; 78 N. W. 604. But see Spurr *v.* Home Ins. Co. 1889, 40 Minn. 424; 42 N. W. 206; Otto *v.* Young, 1910, 227 Mo. 193, 127 S. W. 9, 18, and cases collected 15 Cyc. 260, n. 52.

[6] 1882, 7 App. Cas. 345, 360.

has thought that he would choose one of two remedies, even though he has written it down on a memorandum or has indicated it in some other way, that alone will not bind him; but so soon as he has not only determined to follow one of his remedies but has communicated it to the other side in such a way as to lead the opposite party to believe that he has made that choice, he has completed his election and can go no further; and whether he intended it or not, if he has done an unequivocal act — I mean an act which would be justifiable if he had elected one way and would not be justifiable if he had elected the other way — the fact of his having done that unequivocal act to the knowledge of the persons concerned is an election." [1]

But there would seem to be no harm in permitting one who has indicated, by an unequivocal act, his intention to pursue one remedy, to change his mind and pursue the other, unless injustice will result to the other party. It has accordingly been contended that " the doctrine of election is really an application of the doctrine of estoppel," and that " an election by the party having a choice should not be conclusive upon him, until he has done an act making it impossible for him to choose again, or making it injurious to the public or unjust to the opposite party." [2] If this view be accepted, neither the commencement of an action nor any subsequent proceeding short of a judgment in favor of the plaintiff or against him on the merits, constitutes an election. For the plaintiff should always be permitted, upon terms that will save the defendant from prejudice, to amend his pleadings or voluntarily to discontinue his action and commence another. Likewise, the receipt, by the owner of goods tortiously sold, of the proceeds of such sale, is not an act which should estop the injured party from recovering damages for the conversion in excess of the amount received by him.

[1] See also W. H. Griffith, "Election of Remedies," 16 Law Quart. Rev. 160.

[2] Professor Corbin, "Waiver of Tort and Suit in Assumpsit," 19 Yale Law Jour. 221, 239. And see Trimble *v.* Bank, 1897, 71 Mo. App. 467, 486.

§ 299. **Same: The case of joint tort-feasors.** — As has been stated, the obligation of joint wrongdoers to pay damages is held in America to be joint and several; while the obligation to make restitution, upon principle at least, is several (*ante*, § 289). May the person injured sue one of two joint wrongdoers for damages and the other for restitution? Or is an election as to one conclusive in favor of both? The authorities are not harmonious, but the true rule is believed to be that, subject to the limitation that a judgment in favor of or against one tort-feasor may be held to bar all subsequent proceedings against the other (*ante*, §§ 295, 296), the person injured is entitled to a separate election against each tort-feasor.[1] It has been contended that the bringing of an action for goods sold and delivered against one joint tort-feasor is an election to treat the transaction as a sale, and that subsequently to bring suit for damages against another is inconsistent and absurd.[2] But a conclusive answer to this argument is that it rests solely upon the fiction that the bringing of assumpsit turns a conversion into a sale; that this fiction is indulged for the purpose of giving a remedy and should not be employed to deny a remedy; and that there is no injustice or hardship to two joint wrongdoers in allowing a separate election of remedies against each.

§ 300. **Same: The case of successive converters.** — If it is true, as contended in the preceding section, that there is a separate election against each of two or more joint tort-feasors, it would seem to follow that in case of successive converters of the same property an election as to one converter is not conclusive as to another. For example, if A's goods are seized by X and subsequently sold by X to Y, who refuses to deliver them up to A, the commencement of an action against X, even though held

[1] See Elliot *v.* Porter, 1837, 5 Dana (35 Ky.) 299; 30 Am. Dec. 689; *In re* Pierson's Estate, 1897, 19 App. Div. 478; 46 N. Y. Supp. 557, 562; Huffman *v.* Hughlett, 1883, 11 Lea (79 Tenn.) 549.

[2] Terry *v.* Munger, 1890, 121 N. Y. 161; 24 N. E. 272; 8 L. R. A. 216; 18 Am. St. Rep. 803. See also Du Bose *v.* Marx, 1875, 52 Ala. 506, 510; Floyd *v.* Browne, 1829, 1 Rawle (Pa.) 121; 18 Am. Dec. 602.

to be an election as to X, should not be regarded as an election as to Y.[1]

If, in the case just stated, X purports to sell the goods as A's agent, the bringing of an action by A against X to recover the proceeds of the sale as money had and received to A's use may be evidence of a ratification of the sale;[2] and, of course, if the sale is ratified Y cannot be held for conversion. Moreover, even if X does not profess to act for A, the bringing of an action of assumpsit by A against X and the attachment of the goods converted as the property of X, may, it seems, estop A to sue Y, in case Y buys the goods from X without knowledge of the conversion, and in reliance upon the evidence of ownership afforded by A's conduct in suing X in assumpsit and attaching the goods as X's.[3]

[1] Rice *v.* Reed, [1900] 1 Q. B. 54; Huffman *v.* Hughlett, 1883, 11 Lea (79 Tenn.) 549. In the latter case the court, speaking of waiver of tort, said (p. 554): "It is simply an election between remedies for an act done, leaving the rights of the injured party against the wrong-doers unimpaired until he has obtained legal satisfaction. If it were otherwise, the suing of any one of a series of tort-feasors, even the last, on an implied promise, where there was clearly no contract, would give him a good title and release all the others."

[2] See Marsh *v.* Pier, 1833, 4 Rawle (Pa.) 273; 26 Am. Dec. 131.

[3] Nield *v.* Burton, 1882, 49 Mich. 53; 12 N. W. 906. In this case it was said that the fact that the action against the first converter was brought in a court which was without jurisdiction did not affect the estoppel. See also Rowe *v.* Sam Weichselbaum Co., 1908, 3 Ga. App. 504; 60 S. E. 275.

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